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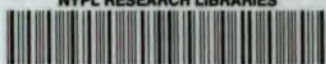
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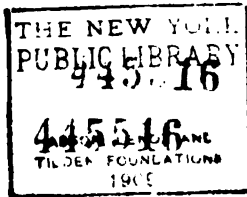
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DECISIONS
OF
THE DEPARTMENT OF THE INTERIOR
IN
APPEALED PENSION AND BOUNTY-LAND CLAIMS;
ALSO
A TABLE OF CASES REPORTED, CITED, OVERRULED,
AND MODIFIED,
AND OF
STATUTES CITED AND CONSTRUED.

1431-12 ✓
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DECISIONS RELATING TO PENSIONS.

GUARDIANSHIP—MINORS—PENSION FUND.

CALISTA A. STOMBAUGH, GUARDIAN OF MINOR OF DANIEL T. HALL.

Soldier died August 5, 1884, leaving the appellant, his widow, and a minor child, William P., under 16 years of age. The widow, mother of said minor, remarried December 25, 1884. Said minor was born July 29, 1883, and has resided with his uncle, David H. Hall, continuously since he was 16 months old, who was duly appointed his guardian by the district court in the State of Iowa September 5, 1890. October 4, 1890, said guardian filed a claim for pension as such guardian under the act of June 27, 1890, and appellant also filed a claim for pension under said act as mother of said minor January 31, 1891, and was subsequently, September 7, 1891, appointed guardian of said minor by the probate court of Hubbard County, Minn. On January 31, 1899, her said claim was rejected on the following ground: "That the claim for the minor under the act of June 27, 1890, has this day been allowed, and payment ordered to be made to David H. Hall, the guardian, who acquired authority anterior to the filing of this claim, or the appointment of Calista A. Stombaugh as guardian." It is held that Hall, having been recognized as a fit person to act as agent of the Government to receive and disburse the money of his ward, and he having accepted the agency thus imposed and nothing appearing in the record showing that he has broken its terms, the Bureau action rejecting appellant's claim for recognition in the claim was without error.

Any contest over the right of possession of the minor or his property must be relegated to the local courts for decision.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 22, 1901.

Calista A. Stombaugh, as guardian of William P. Hall, minor child of Daniel T. Hall, formerly private, Company C, Forty-ninth Wisconsin Volunteer Infantry, who died August 5, 1884, filed a declaration for pension under the act of June 27, 1890, January 31, 1891, which was rejected January 31, 1899, on the following stated ground:

That the claim for the minor, under the act of June 27, 1890, has this day been allowed, and payment ordered to be made to David H. Hall, the guardian, who acquired authority anterior to the filing of this claim, or the appointment of Calista A. Stombaugh as guardian

March 4, 1899, the claimant, by her attorney, filed an appeal to the Department in which the following contentions are made:

Thomas Van Etten, being first duly sworn, states: That he is the recognized attorney of the claimant in the above designated minor's pension claim, under the act of June 27, 1890, which was rejected by letter addressed to the affiant, dated Washington, D. C., January 31, 1899, and signed by Hon. H. Clay Evans, Commissioner, "on the ground that a claim for minor's pension, under the said act, was allowed by cer-

tificate issued January 14, 1899, and payment ordered to be made to David H. Hall, the guardian, who acquired authority anterior to the filing of this claim, or the appointment of Calista A. Stombaugh as guardian." The claimant appeals from the rejection of said claim to the honorable Secretary of the Interior on the ground that the rejection of said claim is unjust and contrary to the law.

At the time the said David H. Hall was appointed the guardian of the minor in Iowa, the said minor for whom pension was claimed was a visitor at the home of David H. Hall, his uncle's, and said Hall, without the knowledge or consent of this claimant, the mother of said minor. The said minor was born and resided in Minnesota with his mother and cared for her and maintained by her until she went to Iowa and visited the uncle, David H. Hall, and left him, at the uncle's solicitation, with him as a visitor, but this claimant did not then nor at any time thereafter abandon said child.

The laws of the State of Minnesota constitute the parents of children residents of the State the guardians of their children, and it would appear to be a legal conclusion that no one could acquire the guardianship of a minor temporarily visiting a relative in another State while the parent and natural and legal guardian under the laws of the State where the minor was born and where the parent resides, unless said parent and guardian had abandoned said child or had consented that another guardian might be appointed in the State where the minor was a visitor.

Claimant respectfully asks that this rejected claim may be reviewed and reconsidered on appeal by the honorable Secretary of the Interior and respectfully states that before the claim was rejected her protests had been filed therein citing the law of the State of Minnesota applicable to the matter, and that the evidence of the birth of the child for whom pension was claimed in the State of Minnesota and of his temporary visiting his uncle, David H. Hall, when the latter was appointed guardian and also the evidence that this claimant had never abandoned said child or consented that said D. H. Hall might be appointed his guardian, was also filed in the claim before it was rejected, and respectfully requests that her said protests and the law of Minnesota as therein quoted and the evidence be all considered in the appeal.

Affiant further states that this appeal is taken in good faith, affiant honestly believing that the rejection of said claim was error and unjust to this claimant.

This appeal raises the question of the justice of the Bureau action in recognizing David H. Hall as the proper person to whom the money for the benefit of the ward should be paid.

The record discloses that the soldier died August 5, 1884, and that on December 25, 1884, the claimant remarried; October 4, 1890, David H. Hall applied for pension as guardian of William P. Hall, the minor in whose behalf the mother applied some months later, as above recited. On the 5th day of September, 1890, the said David H. Hall was duly appointed guardian of said minor by the district court of the State of Iowa. September 7, 1891, the claimant was regularly appointed guardian of said minor by the probate court of Hubbard County, Minn.

The guardian, Hall, employed an attorney to prosecute his claim, and the claimant also employed an attorney, and the Bureau in 1896 recognized the attorney first appointed. The attorney for claimant filed an appeal to the Department, and on June 8, 1896, an opinion was rendered in which the first appointed attorney was recognized. The issue presented in the present appeal was only incidentally involved

in that opinion, and nothing was said therein as to the relative rights of said guardians. It was simply held that the attorney first appointed, by apparent competent authority, and who had not neglected the case, should be recognized.

It will be noted that there is here presented the question of conflicting guardianships. Both were appointed by courts having apparent jurisdiction of the subject-matter. As far as appears both were appointed fully in conformity with local laws. The contention of the attorney that the laws of the State of Minnesota make the mother the natural guardian of the minor children is entirely immaterial to the question here presented for the reason that she did not file claim for pension in behalf of said minor until she had been regularly appointed such guardian by a court of competent jurisdiction. A resort to the facts in this case may well be had at this point.

The minor was born July 29, 1883, and has resided continuously from the time he was 16 months old with his uncle, David H. Hall, at Wadena, Fayette County, Iowa; the claimant seeks to show by her own affidavit that she left the son temporarily with the uncle, but aside from her own statement there is no evidence that she ever tried to regain possession of the minor; the remarriage of claimant in 1884 presents a reason for her giving the child over to the uncle.

When the mother made application for letters of guardianship in Minnesota the minor was not within the State, nor in her constructive possession; at that time the child was actually in possession of another guardian appointed by a court of another State. It does not appear just how she could satisfy the Minnesota court that the minor was within its jurisdiction, but that is a question that need not be inquired into for the purposes of this opinion. But the contention of this appellant that the minor was in the constructive possession of the mother, while it was in the actual possession of a regularly appointed guardian in another State is wholly untenable, because the constructive possession ended as soon as the court gave actual possession to Hall, and this contention need not be further considered.

Recently the Department has rendered an opinion on the question of guardianship and the control of the money belonging to beneficiaries under the law, which, when applied to the question herein involved removes any difficulty in deciding between these guardians. (Commissioner of Pensions, 11 P. D., 351.)

That opinion was rendered May 22, 1901, in response to a letter from the honorable Commissioner of Pensions asking if as a matter of law he had discretion in the payment of pensions to guardians, and if he could follow the money so paid to its application.

In the course of the opinion it is held:

From the rulings above mentioned it very clearly appears that pension money in the hands of a guardian for the benefit of a pensioner is still under the constitutional

control of the Government. If so, then it follows that the Government may direct and supervise its administration, expenditure, and disposition under the limitations and restrictions incident to the pension laws. The guardian as an individual is the agent of the United States, wholly irrespective of the duties devolved upon him by the State law, and is manifestly subject to such direction as to prevent the diversion of the pension money from inuring solely to the use and benefit of those to whom the pensions are granted.

And it was also stated:

Who but the Commissioner of Pensions has power to "secure its safe and unimpaired transmission to the beneficiary?" If a guardian holds pension funds as a State officer, he can not be directed by Congress in its administration. Such a fund in the hands of a guardian is in transitu, as it were, and until it reaches its final destination is controllable only by the United States. When a guardian makes a proper expenditure in behalf of his ward, he does so, not as a State official, but as agent of the Government. No State court can delegate authority to such a guardian relating to the disposition of a pension fund, nor has it competent authority to direct the expenditure thereof. This necessarily follows from the fact that the guardian holds the fund, not in his official capacity as a State officer, but as an individual agent representing the Government of the United States. If, therefore, the Commissioner of Pensions, under the direction of the Secretary of the Interior, has no jurisdiction over a guardian holding pension money, then there is no competent authority, and the guardian is a law unto himself, amenable to no jurisdiction.

In the case of *Edward W. Moore* (9 P. D., 55), the Department held that:

"The words appearing in the act of August 5, 1882, 'may be made to the guardian of such persons,' are not mandatory but permissive."

It was also held by the Supreme Court in the *Hall* case (*supra*) that—

"The guardian no more than the agent or attorney of the pensioner is obliged by the laws of Congress to receive the fund; but if he does, he must accept it subject to the annexed conditions."

One of the conditions, as pointed out by the Supreme Court, is to the effect that the fund still remains subject to the jurisdiction of the United States. If so, then the United States must have the power, through its legally constituted official, to direct and supervise its administration. If the Commissioner of Pensions is without power to direct and control the pension fund in the hands of a guardian, the legislative safeguard above recited would in many instances prove futile and inoperative.

It is to be observed that the above opinion holds that a guardian takes a pension due a ward as an agent of the Government, and is liable to be called upon at any time to account to the Government for the money so received by him.

In other words, the fact that a particular guardian was appointed by a local court vouches, as it were, that he is a fit person to act as agent of the Government to hold and disburse any money coming into his hands. When a given guardian is shown to be a fit person to receive pension money and to use it for its lawful purposes, the Government has no interest in the manner of his appointment or in any conflict of laws of different States.

In this case, the guardian *Hall*, to whom the Bureau decided to pay the pension of the minor, so far as appears from the evidence, was a fit person to act as the agent of the Government. He was selected as such agent because he was recognized by the Iowa court as guardian,

and that warrant appears to have been sufficient. Because at a later date another guardian was appointed by a court of another State, in no way attacks the fitness of the first one appointed. The legality of the appointments, as between the laws of Iowa and Minnesota, is something with which, in such a case as this, the Department has no interest. That question is wholly foreign to this inquiry. The guardian Hall, who was recognized as a proper agent to receive the money, is shown to be a fit person to act as such agent, and just there the Government's investigation may end.

Any contest over the right of possession of the minor, or any property of his that may be involved, must be relegated to the local courts for decision. The contention of this appellant that she is the legal guardian of the minor under the laws of Minnesota does not go to the vital point of inquiry. Primarily the guardian, Hall, was granted the right to receive the pension due the minor because he was a fit agent of the Government, his fitness being shown by the confidence reposed in him by the Iowa court.

Furthermore, it appears that the money was paid to him and that he accepted the agency thus imposed, and nothing in the record shows that he has in any way broken its terms, or that the money has not actually been used for its beneficial purposes.

Therefore, it is clear that the Bureau action in rejecting appellant's claim for recognition in the case as presented was without error, and the same is affirmed hereby.

FEE—ATTORNEYS—APPLICATIONS—ACT OF MARCH 3, 1901.

FRANCES A. PATTERSON AS WIDOW OF GEORGE N. OSLER (CLAIMANT).

MILO B. STEVENS & Co. (ATTORNEYS).

The act of March 3, 1901, in specific language prohibits any person from receiving compensation for services in making application under its provisions; and the words "making application" signify not only the filing of a declaration for pension, but also the filing of evidence showing title to pension.

As the question as to whether an attorney or agent may in such a case collect a fee from the claimant is not properly before the Department, the appeal, in so far as the same relates to this point, is dismissed.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 9, 1901.*

The claimant, Frances A. Patterson, as the widow of George N. Osler, who served in Company A, Ninty-seventh Ohio Volunteer Infantry, was allowed pension under the general law. The soldier died January 17, 1863. She married April 10, 1897, Jesse Patterson, who died August 16, 1900. Upon her remarriage her name was dropped

from the pension roll. In her own behalf, on June 12, 1901, the claimant filed a declaration under the act of March 3, 1901, for renewal of pension which had been allowed her under the general law as the widow of George N. Osler. The appellants on August 3, 1901, filed a power of attorney to prosecute the claim.

The Bureau by letter dated August 6, 1901, informed appellants that they would be recognized as the attorneys in the claim, but that they could not accept from the claimant any compensation for their services.

Messrs. Stevens & Co., August 6, 1901, filed an appeal in this Department in which they set forth their views relative to the right which they may have to collect a fee from the claimant in the event that the claim is allowed through their service.

Section 2 of the act of March 3, 1901, provides as follows:

No claim agent or other person shall be entitled to receive any compensation for services in making application for pension under this act.

That part of the regulations issued by the Bureau relative to the payment of fees to attorneys for securing an allowance of pension under the act of March 3, 1901, reads:

No claim agent, attorney, or other person shall be entitled to any compensation for service rendered in prosecuting a claim under the act of March 3, 1901.

In the appeal it is stated that—

It is noticeable that this circular enlarges the words, "making application for pension," in the act, to "prosecuting a claim under the act." This is tantamount to a denial of the right of the claimant to employ an attorney either to represent her before the Department or to assist in the preparation of the evidence necessary to establish the case.

* * * * *

In the case of Margaret E. Davis (10 P. D., 403) it was held that the Commissioner of Pensions can not refuse recognition to agents and attorneys in any case before the Bureau except when such recognition is expressly prohibited, which is not the case in the claim at bar. Therefore, Congress recognized or did not see fit to restrict her right to employ an attorney. Yet it is not reasonable to presume that Congress recognized her right to employ an attorney and yet intended to deny her right to pay the attorney for his services under the contract of employment.

The act of March 3, 1901, in specific language prohibits any person from receiving "compensation for services in making application for pension" under its provisions. The words, "making application," signify not only the filing of a declaration for pension, but also the filing of evidence showing title to pension.

Section 4786, Revised Statutes, as reenacted and amended by the fourth section of the act of July 4, 1884, contains a provision which reads as follows:

In all cases where application is made for pension or bounty land, and no agreement is filed with the Commissioner of Pensions, the fee shall be \$10 and no more.

Here a class of claims is described as cases in which "application is made for pension." It never has been held by the Department or the

Bureau that under the provisions of the act of July 4, 1884, a fee could be paid for filing a declaration for pension and another fee for filing evidence. The entire service rendered in a claim until pension is secured, may properly be considered as service in making an application for pension. The service for which an attorney is paid a fee is for securing the pension allowed, and no fee is paid until pension is secured. It is quite clear that the intent of section 2 of the act of March 3, 1901, is to prohibit an attorney from receiving compensation for securing an allowance of pension under its provisions, and that the words "No * * * person shall * * * receive * * * compensation for services in making application for pension under the act" fully expresses such prohibition.

So it is not thought that the aforesaid regulations issued by the Bureau are an enlargement of the prohibition contained in the second section of the act of March 3, 1901, relative to the right of an attorney to receive compensation for services rendered in claims for pension under its provisions.

The appellants express the view that the purpose of the foregoing enactment is to leave the matter of fee to be adjusted by the claimant and an attorney, as to his services in prosecuting a claim for pension under the act of March 3, 1901.

The proceedings have not reached a stage where any question can arise with reference to the payment of a fee. The Commissioner of Pensions has seen fit to notify the appellants in advance of the adjudication of the present claim, that they can not receive any fee for their services in the event of the allowance of pension. He has taken no action in the matter whatever, but has only advised the appellants as to his proposed action with reference to their rights if they secure an allowance of pension for the claimant. It is manifest that the appellants have as yet no good ground for appeal to this Department. It is not believed that the views of this Department should be expressed relative to the questions presented by the appellants until they are brought before it at a time and in the manner which the rules of practice provide, viz. after final action allowing the claim by refusal on the part of the Bureau to certify a fee or to permit acceptance by them of one directly from the claimant.

Accordingly the appeal is dismissed.

DIVISION OF PENSION, ACT MARCH 3, 1899—DESERTION.

NANCY J. HARRIS *v.* HOMER V. HARRIS.

As the evidence in the case fails to show that pensioner deserted his wife, within the meaning of the act of March 3, 1899, the payment to her of one-half of his pension was error.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 9, 1901.*

Homer V. Harris, late sergeant, Company D, Ninety-ninth Illinois Infantry, and pensioner under Certificate No. 131455, appealed November 3, 1900, from the Bureau action of July 6, 1900, allowing the claim of Nancy J. Harris, his wife, for division of his pension, filed August 31, 1899, under the act of March 3, 1899, on the ground that "pensioner deserted claimant, his lawful wife, who is a person of good moral character and in necessitous circumstances."

The Bureau reported August 9, 1901, as follows:

Herewith are referred to you the papers in the claim of Homer V. Harris, late sergeant, Company D, Ninety-ninth Illinois Volunteer Infantry, Certificate No. 131455, and the papers in the claim of Nancy J. Harris, wife of the said soldier, together with the pensioner's appeal from the action of this office in allowing his said wife's claim under the act of March 3, 1899, and his affidavit, with receipt for registered letter, showing compliance with the rule laid down in the Ellis case.

Mrs. Harris filed her claim August 31, 1899, and supplemental affidavit alleging desertion on the part of the pensioner May 19, 1900. The claim was allowed July 6, 1900.

Appellant contends that the evidence in the case shows that claimant deserted him and refused to live with him, and that he had never been absent from his home, and he cites the departmental decisions of September 5 and 15, 1900, in the cases of *Rothery v. Rothery* (11 P. D., 77), and *Richards v. Richards* (ibid., 90).

Claimant, aged 56 years, alleged in her declaration that her husband has not supported her for the last nine years and then refused to give her a support, and does not even speak to her.

In an affidavit of April 4, 1900, she testified in relation to their separation as follows:

My daughter worked for a family near us and came home nights to sleep. On morning of the day he left me he talked very roughly to her for lying in bed till 6 o'clock. She made no reply, but went to her work. He finished his breakfast and went to his work. At noon I called him in to dinner. We sat down and ate. When he got through he pushed back from the table and said, "Well, this is the last meal I am going to eat with you." Of course I was astonished. I asked what he meant and what he was going to do. He said that hereafter I could have the three rooms downstairs, which we then occupied, and he could take two rooms upstairs, a bed, some bedding, and other things he needed, and he was going to do for himself. I begged him not to do so and tried to reason with him, but got no satisfaction. He gave me \$5 with which to get started, then a small amount each week thereafter until about the 1st of December, then without warning he stopped that. It so happened that a large blanket factory that had lain idle for several years commenced running, and my daughter got employment at good wages. She said she would support me the best she could. She made her home with me, and we did very well for four years. The factory closed. We pinched along for another year on her scanty week's earnings, then she married a man who had nothing but his hands and a willing mind. They said they would see that I was provided for. They had a farm rented and the owner desired they take possession at once. I was sick at the time, and they

couldn't leave me alone, so they hauled me along with them, and as they had but one bed I had to take mine with me. One day in March my daughter went to town and I requested her to go to the house and get a few articles I needed. Mr. Harris had forced an entrance into my rooms and fastened door on inside. She could not get in. He saw her and told her that if I would come and ask him to he would let me in. I was still quite poorly, but soon as I could I went, and found him ready to make me an offer for my interest in the place. If I would sell he would take a life-time lease on a part of the vacant lot and would deed the home part to his son, Jim Barry, and his daughter in Springfield, the son to occupy one-half of the house, the rent from the other half to go to the daughter. I had intended all the time to go back to the house as soon as I got strong enough and live there, although my son-in-law had said several times that it would be much easier for them to support me in their own home than it would be in a separate home, but I could do nothing to help him about it, so decided to take Mr. Harris's offer. In fact I could see no other way for me. We went right away and had writings drawn that took from us both all claim on the home place, and on the next day after, which was April 5, 1894, instead of November as stated in your letter, I moved my things away.

Mr. Harris fenced off his share of the vacant lot, fitted up a little frame building he had been using for a shop, and made for himself a snug little house and moved into it and there is where he lives.

My reasons for refusing to live with him: He never made a proper or satisfactory proposal to me; it was only a formal plan he took to get his son and daughter-in-law to be witnesses for him. He didn't want me to live with him. I positively never did refuse to live with him under proper and satisfactory terms.

Clarisa Holton, a witness on behalf of claimant, testified in an affidavit May 16, 1900, that she knew of her own knowledge that pensioner deserted his wife, Nancy J. Harris, and that such desertion was willful and, to the best of her knowledge and belief, was without provocation on the part of said wife; that pensioner had stated to affiant that he could not live with his wife, but did not give any reason why or make any complaint against her; that said desertion occurred about the middle of April, 1889, and, that as near as affiant could remember, they had not since lived together as husband and wife.

Fannie M. Blair, another of claimant's witnesses, testified in an affidavit May 16, 1900, that during the year 1889 affiant made her home with said Harris and wife; that about the month of April, 1889, said pensioner willfully deserted claimant without any fault or provocation on the part of the said claimant, and that they had not lived together since said desertion.

The foregoing embraces all the evidence offered by claimant to establish desertion, and both the foregoing affidavits are open to the objection that they state legal conclusions rather than the facts necessary to establish the legal conclusion.

It is for the Bureau to first decide in claims of this character whether the facts proved establish desertion, it being a legal question; and witnesses can not usurp the functions of the Department or relieve the Bureau of its duty by testifying that one party deserted the other without cause. Witnesses should testify to the facts and circumstances attending the alleged desertion showing an absence of any cause

which would justify one party from abandoning the other. See 1 Wharton, Law of Evidence, paragraph 507.

The pensioner, who is 78 years of age, testified, in an affidavit, October 24, 1899, in answer to the charge of desertion, as follows:

I was married to Nancy J. Harris (née Cloyd), a widow, on the 3d day of July, 1881. We lived in peace and harmony until about July, 1882; then she commenced to find fault and complain of everything—of everything I did to provide for the family. Her conduct from that time was such as to make things as disagreeable for me as possible. In addition to her fault-finding and unpleasant language and conduct directed to me personally, she would permit others to come to our house that were objectionable to me, especially one man that I drove away and forbid to come on the premises. Matters finally reached that point that by mutual consent or agreement we occupied separate beds, and I cooked for myself and provided her money for her support, giving her the same amount allowed myself, both of us living in the same house. Matters continued in this manner until about November 21, 1889. She then found fault and complained that I did not properly support her; that I did not give her enough money. On the 21st day of November, 1889, I gave her notice that I would take my place at table next Monday morning and do the best that I could, and that (if) she would do a wife's part by me, that I would place \$10 per month in her hands; her daughter, Fanny (by former marriage), who was then of age and earning her own living, should pay \$1.50 per week for her board. My wife, Nancy J. Harris, agreed to this as above stated November 21, 1889. Now, on the 23d day of November, 1889, in the morning, when I was cutting wood, she, my wife, Nancy J. Harris, came to me and told me that if that was my calculation I need not go any further, that I should not come back—repudiating the agreement we had made November 21, 1889. December 16, 1889, I went to my wife, Nancy J. Harris, and spoke to her as follows: "Now, I want this thing settled. I propose to come back and take my place in my family where I belong, bed, board, and all that. I will expend my pension to keep up the table and fuel, and what I can earn outside of that I will get my clothing, pay taxes and mortgage, keep up repairs, pay doctor bills and other incidental expenses, and you shall do a wife's part by me; that when you speak to me pleasantly I will attend to your wants, otherwise I would pay no attention to what you say. I will do the best I can do, as I have always done as far as my financial and physical ability would admit of;" and that her daughter, Fannie (heretofore mentioned), should pay \$2.50 to \$3.50 per week for her board. My wife, Nancy J. Harris, said then and there that I should not come back, saying also at the same time and place, "No; I will not cook for you; I will not wash for you. No; I will not let you come back to my bed; no, you shall not come back." On the evening of December 16, 1889, I made the same proposals as above stated to my wife, Nancy J. Harris, and she rejected the same just as above stated. These proposals made by me and rejected by my wife, Nancy J. Harris, on the evening of December 16, 1889, was done in the presence of the following witnesses: Virgil L. Harris and Abbie Harris, his wife, who lived in the same house at that time. I made a memoranda of the foregoing, and have the same now in my possession. We continued to live in the same house as heretofore stated until about November 5, 1894, when my wife, Nancy J. Harris, left my house without my consent or approval. She never offered or in any manner or way intimated that she desired to come back to me. I never abused her or in any manner mistreated her or compelled her in any manner to leave me. I proposed to do everything that I could do in order that we could live together as husband and wife should live. She would not speak to me or have anything to do with me for some time before she left me. She has never in any manner shown any desire to come back to me. I have lived and am now living on the same premises. I have resided in this cit,

(Barry, Ill.) for the past fifty years, except while in the army in 1861 and 1865. About everybody knows me in this city. As to my reputation as a sober and industrious and law-abiding citizen, reference is made to the affidavits herewith inclosed.

I am past 78 years of age, and physically unable to earn a support by manual labor. I am poor and entirely dependent on my pension for a support.

Eliza E. Brown, aged 66 years, testified, in an affidavit, October 24, 1899, as follows:

I have known Homer V. Harris, herein mentioned, fifty years, have lived within one block of his residence over thirty years, and have been intimately acquainted during that time. In relation to the trouble between him and his wife, Nancy J. Harris, I know that their neighbors always blamed Nancy J. Harris for the trouble, and I never heard any of the neighbors blame him as the cause of the trouble in any way. I know that Homer V. Harris has always been an industrious, sober, and law-abiding citizen, and provided for his family to the best of his ability. I never heard him utter a rough word in my life, and I never heard others accuse him of using rough or improper language.

Eugene Smith and William S. Brown testified, in a joint affidavit, October 21, 1899, as follows:

We have known Homer V. Harris, herein mentioned, for thirty years. We have lived in the same city (Barry, Ill.), within a few blocks of the residence of Homer V. Harris, for thirty years. From our long and intimate acquaintance with Homer V. Harris we know that he has always been and is now a peaceable, sober, and law-abiding citizen, and is now and has been for many years a member of the Baptist Church in this city in good standing. From our long and very intimate acquaintance with the said Homer V. Harris, it is our belief that the said Homer V. Harris never in any manner gave his wife, Nancy J. Harris, any just cause for leaving his home, as she has done.

Virgil L. Harris and Abbie Harris testified, in a joint affidavit, October 23, 1899, as follows:

We were present on the evening of December 16, 1889, at the residence of Homer V. Harris, in the city of Barry, Pike County, Ill., when Homer V. Harris proposed to his wife, Nancy J. Harris, that they should live together as husband and wife should live, and the said Nancy J. Harris in our presence refused to so live with the said Homer V. Harris. We were living in the same house then, and are now living in the same house.

As held in the case of *Rothery v. Rothery* (11 P. D., 77):

The word "desertion" in said act of March 3, 1899, is used in its general legal sense, and desertion in law is a willful abandonment of an employment or a duty in violation of a legal or moral obligation, and, as applied to the matrimonial relation, means the willful withdrawal of one of the married parties from the other or the voluntary refusal of one of the married parties to renew a suspended cohabitation, without justification, in either the consent or the wrongful conduct of the other. As stated by Bishop, in his work on Marriage, Divorce, and Separation, paragraph 169:

"To constitute desertion there must be a simultaneous separation and intent to desert, and it does not exist without the presence of both. The two need not begin together, but the desertion commences whenever to either one the other is added.

"The affirmative elements are two—the cohabitation ended and the offending party's intent to desert. Negatively, it must be without legal justification."

As stated by Stewart, on Marriage and Divorce, paragraph 251:

"To establish desertion three things must be shown: First, cessation of cohabitation; second, the intention of the mind of the defendant not to resume cohabitation;

third, the absence of the complainant's consent to the separation or conduct justifying it. * * * One can not be deserted while he or she consents to the separation, and the one who intentionally drives the other away deserts such other."

Separation is not desertion, as announced in *Ingersoll v. Ingersoll* (49 Pa. St., 249), and the mere fact that parties are living apart does not even raise the presumption of desertion, and separation by mutual consent of the parties is not desertion in either. The consent may not be expressed; it may be inferred from conduct. (See also S. C., 256.)

So also the intent must be intended to be permanent, and the one who has the intent to desert, whether it be the one who leaves the matrimonial home or not, is the one who deserts. (Ibid., 254-255.) As held in *Marker v. Marker* (11 N. J. L., 257), "desertion is a question of intention."

The desertion must be against the will and consent of the party deserted. See cases of *Rose v. Rose* (50 Mich., 92); *Beller v. Beller*. (Ibid., 51.)

As stated by Judge Campbell in the case of *Cooper v. Cooper* (17 Mich., 205):

"Desertion can only be complained of when it is against the will of the party who is deserted. If there be a separation by consent, that consent shows that the parties deem it no grievance to be deprived of each other's society."

A separation commenced or continued by mutual consent or agreement does not constitute desertion. (9 Am. and Eng. Ency. of Law, 2d ed., 775, and note 4; *Wright v. Wright*, 80 Mich., 572; *Ingersoll v. Ingersoll*, 49 Pa. St., 249, and reported in 88 Am. Dec., 500; *Schouler's Domestic Relations*, 5th ed., 320-339.)

Claimant contends, in a communication filed August 16, 1901, that pensioner told her, about April, 1889, that he would live with her no longer, and she refers to her former affidavit in the case; that pensioner, though much older in years than herself, is quite spry and can earn some money by light work; that "he can walk 3 miles to the creek, fish all day, and then walk home at night," while she is scarcely able to do her housework, which is very little, and that all she has to live on is the half pension.

There is nothing in this communication to indicate that pensioner's absence from her is against her consent or in opposition to her wishes.

The Department is clearly of the opinion that the evidence in this case fails to show that pensioner deserted his wife, and the action appealed from is accordingly reversed.

DISLOYALTY—DURESS—DESERTION—SECTION 4716, R. S.

JOHN W. PAYNE.

The evidence in this case shows that appellant and others, who were in hiding to avoid conscription in the rebel army, were Union men; that in the spring of 1863 one Captain Love, of the Confederate States army, came into that community with some men and threatened to burn the homes of Union families unless those men came in and went into the Confederate army; that to escape was then impossible, and they all came in and joined said Love's command, but were never sworn into the Confederate service nor did military duty; that appellant left said company within six weeks thereafter, and before its organization was completed, and joined the Union Army, and served therein until 1865.

Held: That these facts do not establish a voluntary aiding and abetting of the rebellion against the authority of the United States within the meaning of section 4716 of the Revised Statutes.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 21, 1901.*

John W. Payne, formerly private Company D, Second Arkansas Volunteer Cavalry, filed June 24, 1896, application for pension under the act of June 27, 1890, which was rejected May 5, 1899, in the following language:

Reject upon the ground of no title under section 4716 by reason of voluntary service in Confederate States Army, shown by special examination.

On the same date, May 5, 1899, a letter was sent the claimant notifying him that his claim had been rejected on the ground that he was not ratably disabled within the meaning of said act of June 27, 1890.

May 29, 1899, the claimant filed an appeal to the Department. In the appeal appears the following:

About the 1st of March, 1898, my claim was referred to a special examiner. March 21, 1899, the examiner came and examined me and affiants in regard to Confederate service only. He, the commissioner, rejects me on the ground that I am not disabled. What was the use of the examiner coming to examine me on Confederate service? Every affidavit he got testified that I was conscripted. I was only with the Confederates about one month.

With the papers was the following report of the honorable Commissioners, under date of August 16, 1901:

Respectfully transmitted to the honorable Secretary with the suggestion that the appeal be dismissed.

It will be observed that an erroneous notice of rejection was sent to soldier, so that his appeal was taken under a misapprehension.

A corrected notice of ground of rejection of invalid claim has this day been sent to the widow; copy herewith.

It appears that the soldier died November 27, 1899, and that the widow filed a claim under the act of June 27, 1890, which was rejected March 16, 1900, on the same ground as the rejection of the soldier's claim, namely, "Voluntary service of the soldier in the Confederate army."

It does not appear that she has appealed from said action.

In view of the fact that had the soldier lived he would undoubtedly have appealed from the real ground of rejection, as he did from the action he thought had been taken, or that he would have appealed from said action had not the Bureau's error misled him, the Department is of the opinion that a review of the facts in the case is warranted, in order that full justice may be done in the matter. Accordingly, the appeal will be treated as one from the Bureau action of rejecting the claim under the provisions of section 4716, Revised Statutes.

The statement of the claimant is to the effect that his parents both died and were buried in one grave when he was 8 years of age. He was raised by Isaiah Dodson, in Cave Creek, Newton County, Ark.; that the said Dodson was a Union man; was elected a Union delegate to the State convention at Little Rock and voted against secession; that he (the claimant) imbibed his ideas of the right and wrong of the two sides to the conflict from Dodson; that in 1862 and the first of 1863 he was in hiding in the mountains, with a son of Dodson, and a number of others to escape Confederate service; in the spring of 1863 they were completely surrounded by Confederates, and Dodson, who had been threatened by them for feeding those in hiding, informed them of this fact, and they came out of hiding and joined a Captain Love's company without resistance, they well knowing resistance would be useless. He remained with the company six weeks; there was no drilling and but few roll calls, and he finally deserted and joined the Union forces in July, as shown by the record.

G. B. Greenshaw testified that he was with Captain Love while his company was being recruited and that all the men in said company were "practically" conscripted; that the claimant was in the company. The conscript act was in effect when the company was recruited; the claimant was a Union man and was so regarded by all those who knew him; Love's company was not mustered into the Confederate service as it was originally formed. This affiant testified that the claimant deserted from Love's company at the first opportunity; that he was a Union man and served in Love's company under protest.

Alex. C. McCutcheon testified that he knew the claimant was in Love's company, but that he was in sympathy with the North and deserted from said company at the first opportunity.

William R. McCutcheon testified that in 1862 he hid in the woods with claimant after the conscript law went into effect (April, 1862). This witness continued:

He (claimant) was not a Confederate and was not willing to go in the Southern army.

This witness stated that the claimant remained but a short time in Love's company, deserting among the first who did so and joined the Union forces.

John Curtis, who was in hiding in 1862 with claimant, testified that the claimant was a Union man. He knew that claimant was for a short time in Confederate service, but he did not believe such service was voluntary.

A. J. McCutcheon, who also was in hiding with claimant to avoid Confederate service, testified that he personally knew that claimant was opposed to secession and sided with the North. The witness, with claimant and a number of others, gave themselves up to Love in the spring of 1863. He continued:

We were known as Union men by the Confederates, and it was becoming so hot that we had to get into one army or the other. We could not get into the Federal Army at the time, and accordingly went in with Captain Love, and all the Union men at different times and soon deserted. * * * The claimant (Bunk Dodson) and I deserted in five or six weeks. The claimant and I joined Company D, Second Arkansas Cavalry, and remained to the end of the war.

George W. Greenshaw, who was one of those in hiding with claimant, testified that claimant was a Union man. He stated as follows, in part:

Finally, in the spring of 1863, Harry Love came into the neighborhood with a lot of men and threatened to burn the homes of Union families if we did not come in and go into the Confederate Army. We could not get away, and under these conditions the claimant enlisted and deserted in a very short time.

James H. Young testified:

We (himself and claimant) were neither one volunteers in the Confederate service. We went into Love's company in the spring of 1863 and went to Clarksville. I went as far as Fort Smith. The claimant deserted at Clarksville, I think. * * * The conscript law was in actual operation, and we could not get to the Federal lines. We did not wait until physical force was used, but went into Love's company when notified to go. We had all been lying out in the brush, because we were subject to the conscript law, and when Love commenced organizing his company we came out of the woods and went in to escape what was known in this country as the chain gang. * * *

Jesse R. Taylor made affidavit in 1899 substantially corroborating claimant's testimony.

In a long line of decisions the Department has held where the evidence in a given case shows that a claimant entered the Confederate service for the purpose of getting from such service in the Union lines, such service is not within the inhibition of section 4716. See cases of James H. Rainey (8 P. D., 77); John H. Kimball (11 P. D., 124); Lewis Riddle (11 P. D., 252), and cases therein cited.

In the case of Augustus H. Longee (7 P. D., 586) it was said:

The sufficiency of the evidence to rebut the presumption of voluntary service in the Confederate Army must depend on the circumstances of each individual case.

In some respects the case under consideration is peculiar. In the first place, there is no record in the War Department of claimant's service in the Confederate Army. The presumption as to voluntary service arises solely from his own statements and that of the witnesses found on special examination. Founded thus upon statements, the whole of said statements must be considered under the rules of the law of evidence. While it is true that all the statements agree as to the service in Captain Love's company, there is no evidence at all that this company ever became a part of any regiment of the Confederate Army except the following entry from the records of the War Department:

The name of John W. Payne has not been found on the roll of Capt. James H. Love's company, C, Seventh Arkansas Cavalry, Confederate States Army, for Novem-

ber and December, 1863 (only roll of company on file). Roll shows that the company was recruited in Seavey County, Ark., between December, 1862, and August, 1863.

The undisputed evidence is that the claimant was with Love's company not to exceed six weeks, and that he was enlisted in the Union Army before Love's company was recruited, as shown by the records.

The second peculiar feature of this case is that the first conscript act of the Confederacy was passed in April, 1862, and that the claimant was subject to conscription at the time he enlisted in Love's company. His statement, and that of his comrades and associates, that he enlisted as a result of coercion has much moving force. Then, again, take their statements as to his loyalty in connection with the fact that he was only with the company a short time until he deserted and at once entered the Union service, we have significant facts upon which to found the presumption that whatever service he had with Captain Love was unwilling.

The evidence shows that at the time claimant enlisted in Love's company the nearest Federal troops were 140 miles distant, and that the territory intervening was under Confederate control.

Section 4716 of the Revised Statutes is as follows:

No money on account of pension shall be paid to any person, or the widow, children, or heirs of any deceased person, who in any manner voluntarily engaged in or aided or abetted the late rebellion against the authority of the United States.

In this case there is nothing in the evidence to show that the soldier ever was in actual military service of the Confederate Army. His statement and that of his witnesses is to the effect that he went with Captain Love, but the evidence and record shows that he deserted therefrom before the company reached its regiment.

The evidence is undisputed that the soldier was a Union man in sentiment; that he had been reared in a loyal atmosphere; that for many months he hid in the woods to avoid disloyal service, and finally, when he did join a company, he left it very soon and immediately joined the Union forces.

These circumstances are sufficient to rebut the presumption that his enlistment in Captain Love's company was voluntary. The other facts in the case, as shown by undisputed evidence, bolster and support this presumption to the extent of removing any doubt as to the soldier's loyalty to the Union forces during the war of the rebellion.

The action of the Bureau in rejecting the claim on the ground stated was error and the same is hereby reversed.

COMMENCEMENT—INCREASE—RENEWAL—ACT JUNE 27, 1890.

ANDREW B. CLEVELAND.

Appellant was a pensioner under the act of June 27, 1890, at the rate of \$6 per month, when a claim under the general law, filed by him August 22, 1888, was allowed at the rate of \$6 per month from the date of filing the claim, and his name was accordingly dropped from the roll under the act of June 27, 1890, and placed on the roll under the general law. While in receipt of pension under the general law he filed, January 30, 1892, a claim for renewal and increase under the act of June 27, 1890, which was allowed at \$12 per month from the date of the medical examination, February 3, 1895, and his name was dropped from the roll under the general law. He appealed, contending that the increased rate of pension granted him should have commenced from the date of filing his declaration, January 30, 1892.

It is held that the claim for renewal of pension under the act of June 27, 1890, and increase, his title to pension under said act not having been denied, was not an original claim under said act and the allowance of the same was a renewal of the pension originally granted, and that the increase of the rate of pension was, under section 4698½ of the Revised Statutes, properly made to commence from the date of the certificate of the medical examination held under the pending claim (citing the cases of George Baltzer, 10 P. D., 37; Timothy L. Carley, 7 P. D., 12, and James J. Durkee, 8 P. D., 152).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 28, 1901.

The claimant, Andrew B. Cleveland, served in Company I, Twenty-fourth Iowa Volunteer Infantry. On February 11, 1891, certificate issued to allow him pension under the act of June 27, 1890, from July 18, 1890, date of filing declaration, at \$6 per month, on account of partial inability to earn a support by manual labor by reason of disability due to piles, result of chronic diarrhea, and disease of spine. On August 22, 1888, he had filed a declaration for pension under the general law on account of disability due to piles. The claim was approved for admission, and on May 28, 1891, certificate issued to allow him pension under the general law from August 22, 1888, date of filing declaration, at \$6 per month, on account of disability due to disease of rectum. Thereupon the claimant's name was dropped from the roll under the act of June 27, 1890, and placed upon the roll under the general law.

The claimant was in receipt of pension under the general law at the rate of \$6 per month, when, in his behalf, on January 30, 1892, William Fletcher & Co., of Washington, D. C., filed a declaration for renewal and increase of pension under the act of June 27, 1890. A medical examination was held in the claim February 3, 1895. Certificate issued April 17, 1895, to restore the claimant's name to the roll under the act of June 27, 1890, and to allow pension from February 3, 1895, date of holding medical examination, at \$12 per month, on account of total

inability to earn a support by manual labor from disease of rectum and heart, and debility from age. Thereupon his name was dropped from the roll under the general law. In behalf of the soldier, on May 24, 1900, a motion was filed in the claim to commence pension at \$12 per month, under the act of June 27, 1890, from January 30, 1892, the date of filing declaration for renewal and increase of pension under said act, instead of February 3, 1895, date of holding medical examination, from which date pension was allowed to commence. This motion was denied by the Bureau June 29, 1900. From said action an appeal was entered August 24, 1901.

In the case of George Baltzer (10 P. D., 37), cited by the appellant, it is held in effect that where a pensioner's name has been dropped from the roll under the act of June 27, 1890, and his name is placed on the roll under the general law, and subsequently is restored to the roll under the act of June 27, 1890, to renew pension thereunder and allow increase, the increased rate shall commence from the date of filing the declaration upon which the proceedings are based. (See text, page 38.)

It is manifest that the present claim is not one for rerating. It is either, as is contended by the appellant, a claim for original pension under the act of June 27, 1890, or, as it was treated by the Bureau, a claim for increase of pension under said act. The question arising on this appeal, viz, as to the commencement of pension, hinges upon the character of the claim. The decisions of the Department have been uniform upon the question as to the time of the commencement of pension and increase of pension under second section of the act of June 27, 1890.

All pensions granted under the second section of the act of June 27, 1890 * * * should commence from the date of filing the application therefor in the Bureau of Pensions after the passage of said act upon proof that a pensionable disability existed at the time such application was filed. (Timothy L. Carley, 7 P. D., 12.)

And in all cases where increase is allowed (under the act of June 27, 1890) it will commence from the date of the surgeon's certificate establishing the same, as provided by section 4698½, Revised Statutes. (James J. Durkee, 8 P. D., 152.)

In the present claim the soldier's name was dropped from the roll under the act of June 27, 1890, in order that payment of pension might be made to him under the general law. While he was in receipt of pension under the general law, in his behalf was filed January 30, 1892, an application for renewal of payment of pension under the act of June 27, 1890, and for increase of pension under said act. His title to pension under the act of June 27, 1890, had not been denied by the Bureau, so no controversy was raised by the proceedings as to that question. His title to pension under said act is a matter of record which is shown by the papers in the case. Therefore there existed no cause for instituting proceedings anew for establishing in his behalf a title to pension under the act of June 27, 1890. Hence the proceed-

ings that were instituted in behalf of the soldier by the filing of the declaration on January 20, 1892, are in this essential particular unlike an original claim for pension. In pension parlance the claim is known as a claim for renewal and increase of pension under the act of June 27, 1890. The renewal of pension is based solely upon the soldier's undisputed title to pension under said act. The renewal of payment of pension would not constitute any allowance of pension as distinguished from the continuous allowance of pension pursuant to favorable action by the Bureau in any original pension claim. Under the act of June 27, 1890, the soldier, at the time his name was dropped from the roll under said act, May 28, 1891, was in receipt of pension at the rate of \$6 per month. From that date and prior to January 30, 1892, on which date was filed the present claim, he had not filed any claim for increase of rate and no claim for such increase was pending at the time his name was dropped from the roll. At that time, and to the holding of the medical examination in the present claim, he had no title under the act of June 27, 1890, to a rate in excess of \$6 per month, the rate he was receiving under the act of June 27, 1890, when his name was dropped from the roll so that pension could be paid to him under the general law. Consequently his demand contained in the declaration filed January 30, 1892, for renewal of pension under the act of June 27, 1890, was a demand for payment of such pension and rate under said act as he was receiving at the time his name was dropped from the roll thereunder. Under that law he was without title to any other rate. The act of June 27, 1890, in specific terms provides in effect that the pension granted under the provision of section 2 thereof "shall continue" during the existence of the disability shown in a ratable degree at the time of filing the declaration for pension. Said section does not contain a grant of a multiplicity of pensions to every person described by its terms. There is a grant of but one pension to each person. Where payment of pension to a soldier ceases for a time, not because he is without further title, but for some other cause, or to subserve some purpose, and subsequently payments of pension are renewed under the act of June 27, 1890, these latter payments are but a part of the pension that was allowed in the original claim pursuant to the one grant of pension to the soldier contained in the act of June 27, 1890. Where renewal of payment of pension under the act of June 27, 1890, is the object of proceedings, it must be a renewal of the one pension to which the claimant is entitled under the act of June 27, 1890, viz, the pension he was formerly paid, and at the rate he formerly received. There is no law authorizing the payment of any other pension. His rights under the act, whether or not he is in receipt of pension thereunder, as to any increase of rate, are the same as those of any other pensioner under its provisions; if entitled thereto he can obtain a higher rate by filing a claim for increase. Therefore the

higher rate of pension secured in the present claim is not "original pension" in any sense of the term.

The contention in behalf of the claimant is that the increase of rate under the act of June 27, 1890, should have been allowed from the date of filing the present claim, in lieu of date of medical examination. It has been shown the claim is not an original claim for pension under the act of June 27, 1890; it is also clear that the pension, the renewal of payment of which was the object of the proceedings, could be only that pension at the rate which the claimant formerly received under the act of June 27, 1890. Increase of rate as a benefit to be secured by the proceedings is governed by the law applicable to the commencement of increase of pension under the act of June 27, 1890. The time of commencement of such increase, viz, from the date of medical examination showing increased disability, is so well established by the published decisions of this Department and the uniform practice of the Bureau relative to the question, that further discussion is wholly unnecessary. It suffices to say that the fact that there must be a renewal of the payment of former pension, in the class of claims to which the present case belongs, in order to allow an increase of rate under the act of June 27, 1890, affords no reason whatever for the commencement of increase of rate at any other time than that from which increase of rate under said act is allowed to commence in claims for increase of pension where the claimant is in receipt of pension under the act of June 27, 1890, at the date such increase of pension is allowed. Certainly it can not be presumed that a greater benefit is conferred by the act of June 27, 1890, upon a person who is not in receipt of pension under its provisions than it confers upon a person who is in receipt of such pension. Yet no other conclusion can be reached if increase of rate in the present case were allowed to commence from the date of filing the declaration in lieu of the date of medical examination from which increase of rate has been allowed to commence. Such a view of the act never has met with the approval of this Department. The present case can properly be termed a claim for increase under the act of June 27, 1890. The word "renewal" designates a class of such increase claims to which the present case belongs; it is not descriptive of the character of the pension allowed. In its present connection it implies that the claimant at some time was in receipt of pension under the act of June 27, 1890, and signifies that the claimant demands a restoration of that pension.

The action of the Bureau in allowing increase of rate to commence from date of holding medical examination in the claim was proper.

The views of the Department relative to the issue here presented are correctly set forth in the syllabus of the decision in the case, George Baltzer (10 P. D., 37). The conclusion reached in the decision is not consistent with that expressed in the syllabus.

In that case certificate issued August 14, 1893, to allow pension to the soldier under the act of June 27, 1890, at \$6 per month from July 30, 1890, date of filing declaration. On September 18, 1876, he had filed a claim under the general law for pension on account of chronic diarrhea. The claim was approved for admission, and on March 19, 1895, certificate issued to allow him pension under the general law at the rate of \$2 per month from discharge and \$6 per month from July 21, 1892. Thereupon the soldier's name was dropped from the roll under the act of June 27, 1890. On September 16, 1896, he filed a claim for renewal and increase of pension under the act of June 27, 1890. Certificate issued October 7, 1897, to allow "renewal and increase of pension" at \$10 per month, to commence not from the date of medical examination showing increase, but from the date of filing the declaration. At some time between the date of the issue of April 17, 1895, in the present case, and the issue of October 7, 1897, in the case of George Baltzer, the Bureau changed the practice relative to the time of the commencement of pension in claims termed "renewal and increase of pension under the act of June 27, 1890." The change, so far as can be learned, was not based upon anything that was said by or made in compliance with any order or ruling of this Department. The treatise on the practice approved by the Secretary of the Interior, April 9, 1898, contains no instructions relative to the commencement of pension in such claims, other than relate to the commencement of increase of pension under the act of June 27, 1890. The only published decision of this Department which approves of the commencement of increase of pension under the act of June 27, 1890, in claims for renewal and increase of pension under said act from the date of filing declaration, is the decision in the case of George Baltzer, *supra*.

For the reasons herein set forth said decision is overruled in so far as it conflicts with the holding in this case. The action of the Bureau in the present case, allowing increase of pension at \$12 per month, to commence from February 3, 1895, the date of the medical examination held in the claim showing increase, is affirmed.

NOTICE—REDUCTION—INCREASE—ACT JULY 14, 1892, AND DECEMBER 21, 1893.

SILAS RENICK.

Appellant was a pensioner on the roll at the rate of \$50 per month (first grade). His pension was increased to \$72 per month under the provisions of the act of June 16, 1880.

On April 4, 1896, his rate of pension was reduced to \$30 per month, and on December 1, 1898, he was restored to the rate of \$50 per month from April 4, 1896, date of reduction.

It is held that such reduction of the rate of pension was illegal for the reason that the notice sent to pensioner was not such notice as is prescribed by the act of December 21, 1893, as it did not "contain a full and true statement of any charges or

allegations" upon which it was proposed to reduce his rate of pension, and that the action restoring him to the rate of \$50 per month from date of reduction (April 4, 1896), was illegal, as no medical examination was had showing a decrease of appellant's disability until July 8, 1898, to which date he was legally entitled to remain on the rolls at the rate of \$72 per month.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 28, 1901.*

Silas Renick, formerly sergeant, Company F, Eleventh Missouri Infantry, who is now in receipt of a pension of \$50 per month under the general law for disability due to gunshot wound of left hip, left elbow, left lung, left arm, left side, and left shoulder, was granted \$72 per month for the same disabilities under the act of March 4, 1890, from that date, and who up to that time had drawn \$50 per month. April 4, 1896, this amount was reduced to \$30 per month. Appeal was taken from this action, and on May 24, 1898, an opinion of the Department was rendered in which it was decided that the reduction was made upon insufficient notice under the act of December 21, 1893, and directed that the claim be reopened and a new examination held. This was done, and on December 1, 1898, the claimant was granted \$50 per month from April 4, 1896, the date of the reduction to \$30. From this latter action the claimant filed an appeal to the Department in which the following contention is made:

But there is a legal question that I wish to place before the legal board of review: In giving me a \$50 rating they should have given me the \$72 from the time I was illegally reduced to \$30 until placed back to \$50, the difference being \$22 per month for thirty months, which is justly due me and is being wrongfully withheld from me. The law of 1890 placed me from \$50 to \$72, and under that law I was entitled to \$72 until legally reduced.

In this crude way the claimant fairly presents the law point in issue here.

It is conceded by the Bureau, and found by the Department, that the action of reduction was not made in conformity to law.

The act of December 21, 1893, is as follows:

That any pension heretofore or that may hereafter be granted to any applicant therefor under any law of the United States authorizing the granting and payment of pensions, on application made and adjudicated upon, shall be deemed and held by all officers of the United States to be a vested right in the grantee to the extent that payment thereof shall not be withheld or suspended until, after due notice to the grantee of not less than thirty days, the Commissioner of Pensions, after hearing all the evidence, shall decide to annul, vacate, modify, and set aside the decision upon which such pension was granted. Such notice to grantee must contain a full and true statement of any charges or allegations upon which such decision granting such pension shall be sought to be in any manner disturbed or modified.

It will be noted that the notice to the claimant must contain a "true" statement of any charges or allegations upon which it is sought to disturb or modify the rate of pension. This notice is necessary in

order to give the Commissioner jurisdiction to reduce the rate of pension, and it must be in full conformity with the statute in order that the proposed action shall be legal.

See the opinion of the Department of May 24, 1898, above referred to.

Under the law, upon the receipt of the above opinion the Bureau should have sent the claimant a legal notice and taken action accordingly, but it does not appear that a legal notice was ever sent the claimant. Under departmental instructions a special examination and a test medical examination were held and the claimant was granted \$50 per month from April 4, 1896, the Bureau receding from its former action of reduction to \$30.

The act of July 14, 1892, is as follows:

That soldiers and sailors who are shown to be totally incapacitated for performing manual labor by reason of injuries received or disease contracted in the service of the United States and in line of duty, and who are thereby disabled to such a degree as to require frequent and periodical, though not regular and constant, personal aid and attendance of another person, shall be entitled to receive a pension of \$50 per month from and after the date of the certificate of the examining surgeon or board of examining surgeons showing such degree of disability, and made subsequent to the passage of this act.

It will be observed that a prerequisite to the \$50 rate under the law is a medical certificate, made by competent authority, "showing such degree of disability." Until 1898 there was no medical certificate made in this case after the one made in 1887, which was the foundation of the first \$50 rate granted.

This claimant was lawfully placed on the rolls at \$50 per month, and in 1890 he was lawfully increased to \$72 per month. April 4, 1896, he was unlawfully reduced to \$30, and December 1, 1898, he was unlawfully placed on the rolls at \$50, to date from April 4, 1896.

July 8, 1898, the claimant was accorded an examination before a single surgeon, which examination described conditions seemingly warranting a \$50 rating; this examination was considered unsatisfactory and another examination by a full board was held October 27, 1898, which clearly described conditions and reached the conclusion that he was entitled to \$50 per month and no more.

Therefore, the claimant was shown lawfully to be entitled to \$50 per month from July 8, 1898. Now, as to the period between April 4, 1896, and the last-named date, a period of two years three months and four days, the claimant must be considered as being lawfully on the rolls at \$72 per month and is entitled, for that period, to \$22 per month.

There was no lawful authority for the Bureau to date the \$50 rate from April 4, 1896, no medical examination having been held until two years afterwards, and it has been shown that as a matter of law;

as well as of fact, the reduction in 1896 was improper. The only lawful way to dispose of this matter is indicated above.

It may be well to state that where an informal notice is sent to a claimant, and the fact of the informality reaches the Bureau, a new notice should at once be sent out fully conforming to the law. In this case if the course indicated had been followed none of the embarrassing consequences here presented could have ensued.

Accordingly the action of the Bureau is reversed and the papers are returned for an adjudication of the claim in conformity with this opinion.

DEPENDENT PARENTS—SECTION 4707, REVISED STATUTES, AND ACT OF JUNE 27, 1890.

AMY CHAMPLIN (MOTHER).

A dependent parent is not entitled to pension under either section 4707, Revised Statutes, or section 1 of the act of June 27, 1890, if the soldier on whose account pension is claimed left a widow.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 30, 1901.

The appellant, Amy Champlin, filed, on September 21, 1890, a claim for pension as dependent mother of Rowland J. Champlin, deceased, formerly a soldier in Company M, Ninth New York Heavy Artillery. Said claim was rejected by the Pension Bureau in June, 1901, on the ground that the mother had no title, the soldier having left a widow. From that action she appealed June 21, 1901, contending that she did not make application under the general law, but under the act of June 27, 1890; that at the time of making said application there was no widow of the soldier, she having remarried in 1872, and that the soldier left no children under the age of 16 years at the date of his death in 1871; that on the remarriage of the widow the soldier's mother became entitled; and that the claim should be adjudicated under the act of June 27, 1890.

The "general law," so called (sec. 4707, R. S.), provides that if any person embraced within the provisions of sections 4692 and 4693, Revised Statutes, has died since March 4, 1861, by reason of any wound, injury, casualty, or disease, which, under the conditions and limitations of such sections, would have entitled him to an invalid pension, and "has not left * * * a widow or legitimate child," but has left other relative or relatives who were dependent upon him for support in whole or in part at the date of his death, such relative or relatives shall be entitled, in the following order of dependence * * * namely: First, the mother; etc.

The first section of the act of June 27, 1890, provides that in con-

sidering the claims of dependent parents the fact of the soldier's death by reason of any wound, injury, casualty, or disease which, under the conditions and limitations of existing laws, would have entitled him to an invalid pension, "and the fact that the soldier left no widow or minor children" having been shown as required by law, it shall be necessary only to show by competent and sufficient evidence that such parent or parents are without other present means of support than their own manual labor, or the contributions of others not legally bound for their support.

As the title of a mother, under either law, is expressly made contingent upon the fact that the soldier left no widow or minor child, the point made by the appellant that her claim was filed under the act of June 27, 1890, and not under the "general law" appears to be immaterial.

The act of June 27, 1890, limits its benefits to cases in which the fact that the soldier died by reason of some wound, injury, casualty, or disease which would have entitled him to an invalid pension, and the fact that he left no widow or minor children shall have been "shown as required by law," the law referred to being evidently section 4707, Revised Statutes. It is clear that the intent was not to modify the requirements of said section so far as proof of the two facts stated was concerned, but merely to establish a more liberal rule as to proof of "dependence." It follows that the words "has not left a widow or legitimate child" in the old law, and the words "left no widow or minor children" in the new law, must be construed as identically the same in meaning; and as the words of the older statute have been uniformly construed to mean that the soldier died unmarried and childless, the same import must be given to the words of the later statute.

It is immaterial, under either statute, how long the widow lived after the soldier's death, or whether she remarried or remained single, or whether she is pensionable under existing laws or not. The mere fact that the soldier "left a widow" renders it impossible for the mother to establish one of the conditions essential to give her title to pension.

The action appealed from is affirmed.

MINORS' PENSION—ACT JUNE 27, 1890—WIDOW.

MINORS OF JAMES STILL, ALIAS JAMES.

The fact that a deceased soldier left a widow surviving him who has not remarried is no bar to pensioning his minor children under 16 years of age under the third section of the act of June 27, 1890, such widow having married soldier subsequent to the passage of said act, and not being entitled to pension in her own right. Case of minor of Lafayette G. Howard (8 P. D., 230) is overruled.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
October 12, 1901.*

James Still, a Cherokee Indian, described as "James," in the army records, enlisted November 16, 1862, as a private in Company G, Second Regiment of the Indian Home Guard Volunteer Infantry, where he served until discharged, May 31, 1865.

September 8, 1890, he applied for pension under the general law and under the act of June 27, 1890, alleging in both applications total blindness of both eyes.

His application under the general law was rejected April 14, 1899, for failure to show incurrence in the service, and on the same day his application under the act of June 27, 1890, was allowed at the maximum rate, and he having died November 15, 1893, the accrued pension was paid to his widow, Nah ne or Annie James.

His widow applied for pension in her own right under the act of June 27, 1890, which was rejected April 14, 1899, on the ground that "claimant has no title under the act, she having married soldier after its passage."

At his death (1893) he left two minor children by a former wife (then deceased): Hoon Still, born January 1, 1880, and Jack Still, born May 11, 1882, being, respectively, at date of his death, 13 and 11 years of age.

July 26, 1896, these minors applied by guardian for pension under act of June 27, 1890, as children of the soldier. Their application was rejected April 14, 1899, upon the ground that the minor (Jack) had no title in his own right, "because soldier's widow is still living."

Hoon was over 16 years of age at date of minor's application.

The same attorney appeared in all these claims, and he has appealed from the rejections of all of them.

It is sufficient to say as to the claim of the soldier under the general law that the evidence does not satisfactorily show that the disability (disease of eyes, resulting in total blindness), was contracted in the service. There is no record of army medical treatment for any disease, nor other medical evidence showing disease of eyes at discharge. There are the affidavits of some Indian comrades written out by the attorney and interpreted to the affiants and by them signed mostly by mark, tending to show that "James" had headache affecting his eyes in the service, but it is shown in the special examination that the affiants were ignorant of what they swore to and that the interpreter did not correctly reduce their statements to English, so that the evidence thus produced is almost entirely worthless and insufficient, in the absence of any corroborating record, to warrant the Bureau or this Department in finding service origin of the disability for which pension was asked.

The rejection of the claim of the widow in her own right was legal, because the testimony taken at the special examination clearly shows that she was married to the soldier in March, 1891.

There remains to be considered only the right of the minor, Jack Still, who, as shown, was 11 years of age at death of the soldier, and 14 years of age at date of his application through a duly appointed guardian.

The evidence disclosed that the soldier had been married prior to his marriage with Nah ne, or Annie; that the minor is the child of his first wife who died in 1885; that the soldier's last wife, Nah ne, never had the care or maintenance of the children of soldier by his first wife, they having been cared for and supported by a relative of the soldier, and were so being maintained at date of the guardian's application.

Under the construction given to section 3 of the act of June 27, 1890, in the case of Minor of Lafayette G. Howard (8 P. D., 230), the action of the Bureau would have to be approved.

The facts in that case and the one under consideration are nearly, in fact, in so far as they are legally material, they are, exactly identical.

The section of the act of June 27, 1890, under which this minor's claim is presented, is as follows:

SEC. 3. That if any officer or enlisted man who served ninety days or more in the Army or Navy of the United States during the late war of the rebellion, and who was honorably discharged, has died, or shall hereafter die, leaving a widow without other means of support than her daily labor, or minor children under the age of 16 years, such widow shall, upon due proof of her husband's death, without proving his death to be the result of his army service, be placed on the pension roll from the date of the application therefor under this act, at the rate of \$8 per month during her widowhood, and shall also be paid \$2 per month for each child of such officer or enlisted man under 16 years of age, and in case of the death or remarriage of the widow, leaving a child or children of such officer or enlisted man under the age of 16 years, such pension shall be paid such child or children until the age of 16: *Provided*, That in case a minor child is insane, idiotic, or otherwise permanently helpless, the pension shall continue during the life of said child, during the period of such disability, and this proviso shall apply to all pensions heretofore granted, or hereafter to be granted, under this or any former statute, and such pensions shall commence from the date of application therefor after the passage of this act: *And provided further*, That said widow shall have married said soldier prior to the passage of this act.

It will be observed that this section provides for the pensioning of a "widow without other means," etc., or "minor children under the age of 16 years."

The widow's pension is to be \$8 per month, to which is added \$2 for each child under 16 years of age; and if she dies or remarries then such child or children "of such officer or enlisted man" shall receive such pension.

Because the words "death or remarriage of the widow" are used in said section it was held in said Howard case that the minor's pension

was dependent upon the death or remarriage of the widow; that they were "conditions precedent to the minor's pension under said act."

This reasoning would be unassailable if the widow occupied a pensionable status at death of the soldier. For, all through the pension laws, upon the death of a soldier, the widow is first entitled to his pension or pension arising from his service as a soldier, and, in reason, no one else could have it prior to the time she had forfeited such right.

But it will scarcely be contended that, in the event the soldier leaves no widow, or what amounts to the same thing, leaves a widow not having a pensionable status, his minor children would not be entitled to pension.

This section itself provides for pension for the widow "or minor children," and the words "death or remarriage of the widow" clearly refers to the death or remarriage of a pensionable widow, because a widow without a pensionable status could not receive a pension before her death or remarriage, and consequently her death or remarriage could in no wise affect the right of a minor child of such "officer or enlisted man."

As held in the case of *Minors of George W. Douglas* (11 P. D., 448), the proviso relating to the time of the marriage of the widow to the soldier "does not extend to or affect the title of the minor children," so that even though the widow is not pensionable under said section, the minor children are, notwithstanding the marriage occurred after the passage of the act.

According to the ruling in the *Howard* case, if there was no widow the minor heirs would not be pensionable, the reasoning being, as said in the *Douglas* case, "that title of the children is by and through the mother only."

In the latter case this reasoning was held to be untenable, and that the grant to the children was due to the father's services and "separate from and independent of that of the widow."

That Congress intended by this act to give a pension to the minor children of the deceased soldier is evident from the language of the first section of that act, providing for pension to dependent parents, it making such pension dependent upon "the fact that the soldier left no widow or minor children."

In fact, so zealous are the pension laws in protecting the minors of deceased soldiers, that provision is made in section 4706, Revised Statutes, for paying to the minors the pension of the widow when she abandons them or is of such immoral character as to render her unfit for their care and custody, and this although she remains a widow.

Admitting, as announced in the *Douglas* case, *supra*, that the minor children of an officer or enlisted man (issue of a marriage subsequent to the date of the act) are entitled to pension, the widow not being so entitled, the words in said section 3, making the title of the children

dependent upon the death or remarriage of the widow, if strictly construed, would lead to an absurdity.

This absurdity is avoided by supplying the words "such pensionable" before the word "widow" last occurring in said section, thus making clear and unambiguous the evident meaning that Congress intended.

The authority of courts to interpolate words into an act, not inconsistent with the intent of the legislators, in order to relieve the statute from an absurd meaning, is too well settled to need citation of authorities in its support.

The clear intent of Congress, as before said, was to allow pensions to the minors in cases where there was no widow entitled to pension; and if, as in this case, the widow was never entitled, her death or remarriage was not essential to title in the children.

The case of the Minor heir of Lafayette Howard (8 P. D., 230) is overruled, and the action of the Bureau in rejecting the application of Jack Still, minor child of the soldier, is reversed and the record herewith returned for action as herein indicated.

FEE—ACT MARCH 3, 1901—ATTORNEYS.

FRANCES A. PATTERSON, WIDOW (CLAIMANT).

MILO B. STEVENS & Co. (ATTORNEYS).

An attorney can not receive any compensation for the prosecution of a claim for pension under the provisions of the act of March 3, 1901, either directly or indirectly from the claimant, or from any other person.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, October 16, 1901.

The claimant, Frances A. Patterson, as the widow of George N. Osler, who served in Company A, Ninety-seventh Ohio Volunteer Infantry, was allowed pension under the general law. The soldier died January 17, 1863. She married, April 10, 1897, Jesse Patterson, who died August 16, 1900. Upon her remarriage her name was dropped from the pension roll. In her own behalf on June 18, 1901, the claimant filed a declaration under the act of March 3, 1901, for renewal of pension which had been allowed her under the general law as the widow of George N. Osler. The appellants, Milo B. Stevens & Co., of Washington, D. C., on August 3, 1901, filed a power of attorney authorizing them to prosecute the claim. Upon filing said power they notified the Bureau that the claimant had paid them the sum of \$5, and had agreed to pay them \$5 in addition when her pension was restored, for their service in the claim. From the action of the Bureau requiring them to refund the amount paid to them, this appeal was entered September 16, 1901.

Section 2 of the act of March 3, 1901, reads as follows:

No claim agent or other person shall be entitled to receive any compensation for service in making application for pension under this act.

The appellants contend, in substance, that said section does not prohibit an attorney from receiving compensation for services in the prosecution of a claim under the act of March 3, 1901, direct from the claimant. They argue that the intent of Congress in enacting section 2 of said act was to prohibit the Commissioner of Pensions from certifying, in accordance with the provisions of the act of July 4, 1884, a fee to an attorney for his services in securing an allowance of pension under the provisions of section 1 of the act of March 3, 1901, and leave the question as to the amount and time of payment of a fee for such services to be adjusted by the attorney and the claimant. They state that Congress did not see fit to restrict the right of the claimant to employ an attorney, and therefore argue, as Congress thus recognized the right of a claimant for pension under the provisions of said act to employ an attorney, it is not reasonable to presume that it was the legislative intent to deny to the attorney compensation for his service in securing an allowance of pension in behalf of such a claimant. They also submit that the prohibition contained in section 2 of the act of March 3, 1901, as to attorneys receiving fees for making application for pension, does not imply that a fee can not be paid for services in the prosecution of a claim for pension, such as procuring and preparing the necessary evidence to establish a case.

It is not apparent, if there is a distinction between "making an application for pension" and "services in procuring and preparing the necessary evidence to establish a case" such as appellants seek to draw in their argument, why a fee could not be certified by the Commissioner of Pensions to the attorney in a claim for pension under the act of March 3, 1901, for services in procuring and preparing such evidence. For there is contained in the act of March 3, 1901, no prohibition against the Commissioner of Pensions certifying a fee for services in the prosecution of a claim for pension unless the attorney is forbidden to receive a fee for such services.

If "making application for pension" does not signify procuring and preparing evidence to establish a claim, then it would signify little more than preparing and filing a declaration for pension.

Section 4786, Revised Statutes, as reenacted and amended by section 4 of the act of July 4, 1884, contains a provision which reads as follows:

In all cases where application is made for pension or bounty land and no agreement is filed with the Commissioner of Pensions, the fee shall be \$10 and no more.

Here a class of claims is described as cases in which "application is made for pension." It never has been held by the Department or the

Bureau that under the act of July 4, 1884, a fee could be paid for filing a declaration for pension and another fee for procuring, preparing, and filing evidence. The entire service rendered in a claim until pension is secured may properly be considered as making application for pension. It is for such service when resulting in the securing of pension that a fee is paid to an attorney, and for such services he is prohibited from receiving any compensation by section 2 of the act of March 3, 1901, in claims under the provisions of section 1 of said act.

Section 4785, Revised Statutes, as reenacted and amended by section 3 of the act of July 4, 1884, provides as follows:

No agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension or bounty land than such as the Commissioner of Pensions shall direct to be paid to him not exceeding \$25.

Said section has not been repealed nor amended. By its terms an attorney is forbidden to receive a fee from a claimant for procuring, preparing, and filing evidence, as such service is prosecuting a claim for pension.

Proceedings to secure for a person the benefits of the section 1 of the act of March 3, 1901, constitute a claim for pension.

The words "claim for pension" * * * as used in the statute under consideration (section 3 of the act of July 4, 1884) * * * refer to the assertion of a right to have a pension allowed to the claimant in his or her own right under some law of Congress. (Davis v. Davis, 10 P. D., text, 409.)

When the pension is allowed the fee for the prosecution of the claim if conducted by an agent, attorney, or other person employed by the claimant for that purpose is earned, but it can be paid only upon the direction of the Commissioner of Pensions and then only out of the pension money. (Davis v. Davis, supra, text, 408.)

There does not seem to be any doubt but that the law, independent of any of the provisions of the act of March 3, 1901, forbids an attorney to receive compensation from a claimant for securing an allowance of pension. So it can not be presumed, as appellant contends, that Congress, by section 2 of the act of March 3, 1901, intended to confer upon attorneys the right to collect fees from claimants for their services in prosecuting claims under the provisions of said act. Nor could such intent be gleaned from said section 2, if attorneys were not prohibited from receiving fees direct from claimants for services in pension claims, by the provisions of section 3 of the act of July 4, 1884. For it is quite clear that the intent of section 2 of the act of March 3, 1901, is to prohibit the Commissioner of Pensions from certifying a fee to attorneys and to prohibit attorneys from receiving any fee direct from a claimant for their services in prosecuting a claim for pension under the provisions of said act, and that the words "No * * * person shall * * * receive compensation for services in making application for pension under this act" fully expresses such prohibitions.

In the absence of any restrictive legislation by Congress an attorney is at liberty to make with a claimant a contract for his services in prosecuting a claim for pension, the amount of the fee and the time and manner of payment thereof being matters to be adjusted by the parties to the contract. As was stated by Mr. Justice Brewer in *United States v. Koch* (21 Fed. Rep., 873):

In the absence of a statute prohibiting it, any man may contract for his services; he is not bound to render them; and, rendering them, he may charge the person seeking those services such fee as they may agree upon.

Pension granted by the Government is a gratuity. Congress has the power to legislate on the whole matter, to prescribe the conditions upon which pension shall be allowed, the time of continuance thereof, the conditions upon which parties may assist, or to prohibit them from assisting, in procuring pensions for those who may be entitled.

No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute, or recall at its discretion. (*Walton v. Cotton*, 19 How., 355; *United States v. Teller*, 107 U. S., 6468; *Frisbie v. United States*, 157 U. S., 166; *Eliza Hodgman*, 11 P. D., 18.)

As was observed by Mr. Justice Brewer in *Frisbie v. United States* (157 U. S., 166):

Congress being at liberty to give or withhold a pension, may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to pension and no man has a legal right to interfere in the matter of obtaining pension for himself or others. The whole control of that matter is within the domain of Congressional power.

Congress has seen fit to deny attorneys the right to receive any compensation for their services in prosecuting a claim for pension under the act of March 3, 1901. The matter of allowance of fees in claims for pension is wholly within the control of the legislative will. The advantages that may be impliedly denied to a claimant under said act by deprivation of advice, preparation of testimony, and in securing witnesses and other assistance which attorneys are capable of giving, procuring, or rendering for compensation, affords no reason, in the face of the expressed prohibition of Congress, for permitting attorneys to receive fees for their services in prosecuting claims for pension under the act of March 3, 1901, either directly or indirectly, from the claimant, through any device whatever. Accordingly, the action of the Bureau is affirmed.

MARRIAGE—EVIDENCE—PRESUMPTIONS.

NORA O'BRIEN (WIDOW).

It appears by record evidence that claimant was married to the soldier by a parish priest in Auburn, N. Y., January 9, 1868, and lived with him as his wife until his death in 1887. There is evidence in the case tending to show that he had

previously been married to one Ann Rivers, who has not been seen or heard of in the community where she lived since 1863, and when last heard of was in the almshouse of Erie County, N. Y., where, it is reported, she died in December, 1863.

It is held that the circumstantial evidence in the case gives rise to the inference, with moral and reasonable certainty, that the first wife was dead at the time of claimant's marriage to soldier, and such marriage was legal.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
October 16, 1901.*

William O'Brien, formerly of Company I, One hundred and fifty-fifth New York Volunteer Infantry, was in the military service of the United States from August 25, 1862, to July 15, 1865, when he was honorably discharged. The soldier having died on September 30, 1887, his widow, Nora O'Brien, on July 15, 1890, filed a declaration for pension under the provisions of the act of June 27, 1890. Her claim was adjudicated and approved for admission on October 31, 1891, in accordance with which she was duly placed on the pension roll under the provisions of said act.

Under date of February 4, 1895, the pensioner was given notice to show cause within thirty days why her name should not be dropped from the pension roll on the ground that, prior to her marriage to the soldier, he had been married to one Ann Rivers, or Ann Flynn, who was not shown to have been dead or divorced at the time of his marriage to the claimant.

In response to said notice the claimant furnished evidence tending to show that soldier's first wife was dead at and before the time of his marriage to her. Her name, however, was dropped from the pension roll on March 30, 1895, on the ground that the allowance was erroneous.

Subsequent to this the claimant secured the services of another attorney, who, during the month of December, 1900, filed additional evidence as the basis of an application to restore her name to the pension rolls. This evidence tended to show that the soldier had never been married prior to his marriage to the claimant, and, upon being considered, was, on December 24, 1900, held to be insufficient to warrant any change of action.

From this action appeal was taken on January 28, 1901. The contention is mainly to the effect that the evidence is insufficient to show any prior marriage on the part of the soldier. Incidentally, the question also arises as to whether such prior marriage, conceding that to have been true, is a bar to the pensionable status of the claimant.

There is no record evidence tending to show that the soldier was ever married at any time prior to his marriage to the claimant; nor is there any evidence of any witness who claims to have been an eyewitness to such a marriage. Several witnesses, however, testified that the soldier

about the year 1858 married one Ann or Annie Rivers, or Flynn, in Buffalo, Erie County, State of New York. This testimony tends to show that the soldier and said Ann Rivers lived together only a short time, probably two years, when they separated. It appears that the soldier was a wild and reckless character, a frequent violator of the law, and that he maltreated his wife. His mother stated before a special examiner that "he left his first wife and enlisted in the Army, because she was keeping company with another man named Brennan."

When they separated the wife took up with said Brennan, who also maltreated her. The soldier's mother and sister and other persons living in Buffalo, who knew the first wife, declare that the last they heard of her was that she went to the almshouse of Erie County, where she died. They have no personal knowledge of her death, but such was the report, which they believed to be true. The records of the almshouse show that a woman by the name of Ann O'Brien died there in 1863. No witness has ever seen or heard of her since about that time. There is no evidence whatever that said first wife ever left Erie County after her marriage to the soldier.

It appears that the soldier was sent to the State penitentiary at Auburn on December 5, 1866. An extract from the minutes of that institution on the above-mentioned date, giving the age and occupation of the prisoner, contains the words "has a wife in Buffalo." It also appears that the soldier, for some minor offense, had been sent to the Erie County penitentiary during the month of April, 1862, at which time the records of that institution declare that he was a married man. Said records also show that he was confined in the Erie County penitentiary in February, 1866, at which time he was declared to be a single man. This last-mentioned institution is located in the county in which the soldier married said first wife, and all the testimony relating to her future history locates her in said county.

Mary Corbett appeared as a witness before a special examiner in 1894, at which time, among other things, she said:

I heard that Annie O'Brien, the first wife, lived with a man named John Brennan; he was called Jack; he was a blacksmith; he moved to Chicago, Ill., about eighteen or nineteen years ago. I heard that Annie O'Brien died in the Erie County, N. Y., poorhouse, but I can't say when, nor do I know who told me; it was generally talked in the circle of her old acquaintances. John Brennan had been a married man before he lived with Annie O'Brien, but his wife had died; he married again and had two children when he went to Chicago, Ill. I have only heard of him once since he left here; that was about fifteen or sixteen years ago; the man who told me was Edward Stack (since dead).

Catherine Hazel testified before a special examiner in 1895. Among other things, she said:

He (the soldier) had been married before he enlisted to a young woman named Anna, that worked for his mother before the marriage; I don't remember Anna's maiden name; I only knew her as a servant of soldier's mother; she was about five

or six years older than her husband, William O'Brien. They went to housekeeping, but lived together only a short time and separated. The wife, Anna, went to live with a man named Brennan. I don't remember his first name; he was a large man and a blacksmith by trade; I don't know where he now is. He beat and abused Anna. I went over to see her with Mrs. Lynch, and found her sick and bruised from beating by Brennan. I took her some soup, and the next I heard of her was that she had been taken to the Erie County poorhouse. I can not fix the date, but her husband, William O'Brien, was away in the army at the time. I don't know who caused Anna to be sent to the poorhouse. I never saw her after I took her the soup. I don't think she was ten years older than her husband, William. I think she was not long in the poorhouse before I heard she had died. Mrs. Lynch, above mentioned, told me she was dead.

Delia Fitzpatrick, Catherine McDermott, Sarah J. O'Brien, the soldier's mother, and Sarah J. Haley, his sister, all of whom live in Erie County, testified that Anna, the soldier's first wife, was reported to have died in Erie County poorhouse. None of them fixed the exact date. This report, which was simply hearsay, is corroborated by the fact that no living witness ever saw or heard of her leaving Erie County, and up to this moment no witness has ever heard of her since the marriage of the claimant to the soldier.

Sarah J. O'Brien, the mother of the soldier, in her testimony before the special examiner, after giving the reason above mentioned why the soldier left his first wife, said:

My son never lived with her again. The last time that I ever saw her was at Fort Porter, N. Y., where I went to take something nice to eat to my son William. She was there, and asked him to leave her authority to get the \$8 per month that the local authorities were giving to soldiers' wives that were dependent; but he would not give her the authority, telling her to go to Brennan for her support. I was told afterward that she died in the Erie County poorhouse, but I don't know of this from personal knowledge. I can't tell when I heard she died, nor do I know when she died or whether it was during or after the war, but I think I was told that it was during the war. The person who told me is now dead.

On March 22, 1895, was filed the affidavit of Mrs. Sarah J. O'Brien, which is as follows:

I am the mother of William O'Brien, of Company I, One hundred and fifty-fifth New York Volunteers. I knew his first wife, Anna O'Brien. She was sent to the county house in the year 1864 or 1865. People whom I was acquainted with came to my house from the poorhouse and informed me she was dead. I wrote to my son William, who was then in the war, that his wife had died. I never heard or seen her since I heard she was dead. My son returned home and went away again, and when he came back he brought his second wife, Nora O'Brien, with him.

Sarah J. Haley, the sister of the soldier, testified that she first met the claimant in 1868, when she came to Buffalo with her husband; that—

my mother told the claimant that her husband, my brother William, had been married previous to her marriage with him. I don't know anything about the death of my brother William's first wife, Anna, only that I heard she died in the Erie County, N. Y., poorhouse. I don't know who told me.

It appears from the records of the Erie County almshouse that one Anna O'Brien, aged 35 years, died in that institution on December 19, 1863. This would make some discrepancy in respect to the age of the soldier's first wife, but not sufficient to overcome the almost conclusive proof of identity. The records themselves show that no reliance can be placed upon the accuracy of statements therein contained as to the ages of the inmates of the institution. In August, 1894, a special examiner took the evidence of Almon C. Sturgel, the steward of the almshouse, who had charge of the books and records in the absence of the deputy keeper. He deposed to the effect that he had carefully examined the records from 1861 to 1870, and found that one Ann O'Brien, age 53 years, came to the institution on May 4, 1863; that during the next year her age appears as 47 years; that she was discharged in September, 1870; that Ann O'Brien, a servant, age 35 years, was there for the period of twelve days, and discharged July 6, 1870; that he was unable to find that any person of that name had died in the institution from 1862 to 1870.

In August, 1895, one Charles Hehr, who at that time had charge of the books and records of the institution, was sworn before a special examiner. In his deposition he says:

I find the name of Anna O'Brien on said records, born in Ireland, aged 35 years; and under the heading of "Number of days' board" is 80; and in pencil is written under heading "died" and "December 19, 1863," and no other record is found regarding said Anna O'Brien on the books of said almshouse.

The record evidence shows that the claimant and the soldier were married by a parish priest in Auburn, N. Y., on January 9, 1868. She lived with the soldier until his death in 1887, more than nineteen years, and bore him six children. At the time of his death the first wife had not been heard of for twenty-one years, even conceding that the records of the State penitentiary spoke the truth in declaring that the soldier had a wife in Buffalo, in December, 1866. Since the time of the soldier's death up to the last special examination in 1895 nothing has been heard from said first wife.

The claimant appeared before a special examiner in 1894, at which time she was asked the question:

Do you know anything about a former marriage?

Answer. I do not personally, but his father, deceased, told me he was previously married to Annie Flynn, who died while he was in the war. I asked my husband about it and he said it was true, and said she died while he was in the army. Mrs. O'Brien, my mother-in-law, admitted it to me, and said she died while William was in the army.

This testimony, taken in connection with that of the soldier's mother and his sister, clearly indicates that the claimant knew nothing of the first wife until some time subsequent to her own marriage, which was coupled with the additional information that said first wife had died sometime during the civil war.

There is a statutory provision in force in the State of New York which reads as follows:

If any person, whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority.

The case of *Fenton v. Reed* (4 Johns., 51) was decided by the supreme court of New York in 1809. The facts are set forth in the decision, as follows:

It appeared, upon the trial below, that Reed, the plaintiff below, demanded a certain annual payment of \$25, secured by the constitution of the Provident Society to the widows of the deceased members of that society. William Reed, whose widow the plaintiff below claimed to be, was a regular member of the society at the time of his decease. By the constitution of the society, the widows of regular members were entitled to \$25 annually from the funds thereof. The only point in controversy was whether the plaintiff was the widow of Reed. In the year 1785 she was the lawful wife of John Guest. Some time in that year Guest left the State for foreign parts and continued absent until some time in the year 1792, and it was reported and generally believed that he had died in foreign parts. The plaintiff, in 1792, married Reed. In that year, and subsequent to the marriage, Guest returned to this State and continued to reside therein until June, 1800, when he died. He did not object to the connection between the plaintiff and Reed, and said that he had no claim upon her, and never interfered to disturb the harmony between them. After the death of Guest the plaintiff continued to cohabit with Reed until his death in September, 1806, and sustained a good reputation in society; but no solemnization of marriage was proved to have taken place between the plaintiff and Reed subsequent to the death of Guest.

Upon these facts the court held that a jury would have been warranted, under the circumstances, to have inferred an actual marriage after the death of Guest, and, as the court below had drawn that conclusion, its judgment was affirmed.

The case of *Jackson v. Claw* (18 Johns., 346), a New York case, turned upon the right of Hannah Van Buskirk to have dower in the lands of John A. Van Buskirk. The facts are sufficiently set forth in the opinion of the court, as follows:

The only question reserved for the consideration of the court is whether the lessor of the plaintiff was the wife of John A. Van Buskirk at the time of his death. It is not pretended, if she was his wife, that she is not entitled to recover. It appears that Van Buskirk and the lessor cohabited as man and wife at and near Cocksackie between thirty-five and forty years and had a number of children, the eldest of whom is about thirty-seven years old. On the part of the defendant, it was found that Van Buskirk, in 1779, cohabited with a woman of the name of Jane Blaw, whom he called his wife. They both said that they were married, and had a son whom they called John. They lived together in Fishkill until 1780, when they moved to New Marlborough. In 1781 Van Buskirk returned to Fishkill, and said that he and his wife had parted, and that she had gone to Long Island to her friends. Within six months thereafter Van Buskirk and the lessor were married and removed from Fishkill to Athens. None of the witnesses have seen Jane Blaw since 1780. One of them heard of her upon Long Island, in 1783, on her way to Nova

Scotia, and since that time she has not been heard of. Cohabitation and declarations of the parties afford strong *prima facie* evidence of a marriage in fact; but, in the present case, the presumption is encountered by strong facts producing very great doubt of an actual marriage. Without any apparent rupture between Van Buskirk and Jane Blaw they separated, nearly forty years ago, without any claims or pretensions upon each other that they were husband and wife. It seems to me a jury would have been authorized to say that their intercourse and cohabitation were meretricious. It is not necessary to the decision of this cause to place the plaintiff's rights upon that ground. Jane Blaw went to Nova Scotia in 1783 and has never been heard of since. She must be presumed to have died at the end of seven years from that period. This was so decided in the case of King and Mead *v.* Paddock, from the analogy to the statutes with respect to leases dependent on lives, and the statute of bigamy, and in conformity to the cases there referred to. Still the marriage between Van Buskirk and the lessor, if Jane Blaw was the wife of the lessor, would be void, as it took place during her life. Upon the authority of the case of Fenton and Reed (4 Johns. Rep., 52) we have a right to presume a marriage between Van Buskirk and the lessor at any time subsequent to the period, when we are to presume Jane Blaw actually dead; and this period would be 1790.

After reciting the material facts in the case of Fenton and Reed, the court further held:

In the present case, from 1790 to 1817, a period of twenty-seven years, there was cohabitation, the reputation of marriage, and a good character in society. There are, therefore, much stronger grounds for the presumption of an actual marriage after the presumed death of Jane Blaw than in the case cited.

The case of *Caujolle v. Ferrie* (23 N. Y., 90) was decided by the supreme court of appeals in that State in 1861. In this case letters of administration had been granted to John P. Ferrie as the legitimate and sole next of kin of Jeanne Du Lux, who died in the city of New York in 1854. His claim to administration was contested by the appellant, Caujolle, in behalf of himself and others, residents of France, who claimed to be the next of kin to the deceased; and they insisted that Ferrie, who was undeniably her natural son by one Valentine Ferrie, was not born in wedlock, and, hence, was not legitimate. The question of legitimacy was the only point in the case. Under these facts the court, among other things, held that—

The presumption that an intercourse, illicit in its origin, continued to be of that character may be repelled by a contrary presumption in favor of marriage and of the legitimacy of offspring, although the circumstances fail to show when or how the change from concubinage to matrimony took place.

In relation to the Fenton and Reed case the court said:

If the circumstances in that case authorized the inference of an actual marriage, how much stronger are they in the case now under consideration. There the intercourse between the parties was originally meretricious, and they confessedly lived in adultery until the death of Guest in 1800. No fact was presented other than that they continued to live together until Reed's death, from which the inference of a marriage after Guest's death could be inferred.

The case of *O'Gara v. Eisenlohr* (38 N. Y., 296) is negatively in point. The issue in that case involved the right of Mary E. Eisenlohr

to letters of administration as the widow of Patrick Donnery. Donnery was a miner, and lived with his first wife in the State of Pennsylvania from 1833 to 1842. He then deserted her and went to New York, where he married the claimant, Mary E., with whom he lived until his death in 1856. The first wife remained in Pennsylvania until 1852, when she left that State, saying that she was going to New York. This was about four years before the death of Donnery. One witness testified that he heard of said first wife in 1857, in New York, about one year after Donnery's death. Under these facts the court held that no presumption arose of the death of the first wife before the death of Donnery.

As a general rule (said the court), the law presumes the continuance of life, and the death of neither husband nor wife will be presumed until an absence of seven years without being heard from.

The case of *Charles F. Fordham v. Gouverneur Village* (Vol. 5, App. Div. 565, supreme court of New York) is in point. The material facts are as follows: Mrs. Fordham had been the lawful wife of one Grant, who had deserted her. Four years after said desertion she married Fordham, with whom she lived eleven years, until her death. Fordham brought suit against the village authorities, alleging that a certain street bridge was out of repair and dangerous to travel upon owing to the negligence of the defendants; that his wife, while crossing the same, was thrown to the ground, by which she received injuries that caused her death. The defense set up was that she was not the lawful wife of the plaintiff.

Among other things the court held as follows:

It is a general rule of the common law, that a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death. (1 Am. and Eng. Ency. 28.) While it is presumed, after the lapse of seven years, that the person is dead, yet there is no presumption as to when, during the seven years, his death occurred.

In said case the court further held as follows:

Under our statutes, then, the marriage between the plaintiff and Adella N. Fordham would have been legal if contracted five years after the disappearance of Grant, he not being known to her to have been living during that time. It appears from the opening of the plaintiff's counsel that the parties had been living together openly and notoriously for eleven or twelve years, commencing four years after Grant's disappearance. She died as his wife and was buried as his wife. Conceding that the commencing of their relations was illegal, and did not in law render them husband and wife, because at the time there was no sufficient evidence of the death of her husband, and sufficient time had not elapsed to raise the presumption of his death, and without discussing the conflicting presumptions of innocence on her part, and of the continuance of life on his part, it seems to me that the time which has elapsed since the law raised the presumption of Grant's death, during which they lived and cohabited together as husband and wife and held themselves out to the

public as such, would permit the jury to find a marriage between them subsequent to the time when the law would have presumed Grant to be dead.

The court recognized the common law rule that seven years' absence, under certain conditions, gives rise to the presumption of death. It will be noticed also that that period may run after, as well as before a second marriage. In addition to this the circumstantial evidence in the case gives rise to the inference, with moral and reasonable certainty, that the first wife was dead at the time of the claimant's marriage to the soldier.

In the light of the evidence on file, as well as under the laws of New York, the claimant's marriage to the soldier appears to have been valid, and for that reason the action complained of was erroneous.

The same is therefore reversed with directions that the claim be readjudicated in accordance with this opinion.

DEPENDENCE—WIDOW—ACT JUNE 27, 1890—CHARITABLE INSTITUTION.

MARGARET MORMAN (INSANE WIDOW).

The care and support of an insane widow in a State insane asylum, or by other charity, is not such "means of support other than her daily labor," as will bar her title to pension under the act, in the contemplation thereof. It is held, therefore, that rejection of the claim for that reason was error, and such action is reversed.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
October 26, 1901.*

Henry Morman, late of Company B, Forty-fifth Wisconsin Infantry, was a pensioner to the time of his death, April 5, 1895. His widow, Margaret Morman, being insane, a claim on her behalf for pension under the act of June 27, 1890, was filed August 4, 1897, by Elijah L. Shafer, as guardian. In his declaration the said guardian alleged, in addition to other usual allegations, that the widow was confined in the insane asylum at Mendota, Wis. Thereupon, without requiring other evidence, the claim was rejected May 20, 1898, on the ground that "claimant is insane and an inmate of the Wisconsin Insane Asylum, and supported by the State, and is not dependent within the meaning of the act of June 27, 1890." Appeal from this action was entered May 31, 1898, upon the contention that such construction of the statute was erroneous.

The precise issue thus made is new and without precedent in the decisions of the Department. Some questions of similar import in regard to other classes of claimants under the act of June 27, 1890, have been considered, but none in reference to widows where the only matter to be determined is whether support by a State or charitable

institution bars title under the third section of said act. The chief requisite of that section, differentiating it from other laws, is that a claimant shall be "without other means of support than her daily labor," and in cases heretofore decided involving a widow's title under said section other facts bearing on the question of her means of support have been presented, as the possession by her of certain properties, real or personal, or of an income from sources other than her own labor, or of contributions from other individuals.

When, therefore, in a claim like this, it is admitted upon the allegation of claimant that the widow has no "means of support" of the kinds above indicated, but because she is taken care of in a public institution she is held to be outside the pale of the statute, the question becomes important as well for its newness as for the right to be determined.

In seeking, then, to arrive at the proper interpretation of this law as regards the title of claimant to pension no better method can be adopted than to ascertain the purpose and intent of the Congress in enacting it, and from such purpose to judge whether the clause "other means of support than her daily labor" was meant to include such support as this widow receives, viz, care and treatment in an insane asylum.

One means of learning the purpose mentioned is to recall the condition the statute was intended to remedy, for it is remedial in its nature. As to this it need only be stated that prior to the enactment of the law under consideration, it was an imperative requirement that a widow, before she could be pensioned, must furnish proof that her husband's death was the result of some disease or injury incurred during his military service and in the line of his duty as a soldier. The primary object of the new law was to relieve her of this requirement and to grant the pension simply upon the basis of her being the widow of a soldier who had served ninety days in the war of the rebellion and had been honorably discharged.

At the same time, this liberality of the law-making power does not apply to all widows of soldiers. A limitation is made in the words under consideration, so that the benefits of the section are restricted to those widows who are "without other means of support than their daily labor." Here, as has been often remarked, it was the plain intent to aid those only who were in a measure destitute—whose dependence was upon their own efforts, or who had so little of material possessions as to render the securing a support somewhat difficult and uncertain. Again, the purpose of the grant may be gathered from the plain meaning of the language used, as well as from the leading idea pervading the section, as above indicated, and also by noting the relations of said section to others of similar implication. And all of these means should be used in conjunction, for while there may seem to be

nothing doubtful in the literal import of the clause, yet to hold that if a widow should have even the smallest amount of income, or any resource whatever above her earnings which she could use in her support, no matter how obtained, she would be excluded from the operation of the law, would serve more to nullify the purpose than to execute the provisions of that law. So that the language should be read in connection with the object sought to be accomplished and in the light of like provisions in other laws. In *Sutherland*, on *Statutory Construction*, on page 314, it is stated:

Whether the law be expressed in general or limited terms, the legislature should be held to mean what they have plainly expressed, and consequently no room is left for construction; but if, from a view of the whole law, or from other laws in *pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that, in fact, is the will of the legislature.

And in the same work, on page 288, the following is noted:

In the *Eureka* case Mr. Justice Field said: "Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to what the legislature intended, and when that is ascertained it controls." * * * In determining the scope of general provisions there is a leaning to prevent absurdity, for it can not be deemed intended; also injustice, for like reason.

With these aids, then, in the interpretation of the clause in question, and seeing, as hereinbefore pointed out, what was the object in enacting the third section of the statute, it is not so difficult to reach a conclusion upon the main issue, as made by the appeal. It was clearly not the design of the Congress to confine the class of soldiers' widows, for whom the law was enacted, to a state of abject poverty before they could receive the aid provided, nor to require that they should be objects of charity, because of physical inability to earn a support, in order to become beneficiaries of said law. It seems rather more in consonance with the general spirit of liberality on which the laws granting pensions are based to believe that the purpose was to place these beneficiaries upon a plane of quasi-independence—to relieve them of the odium and discomforts of great poverty or cold charity. And instead of making it essential that such applicants should be mentally or physically incapacitated for labor, or should be cared for by a State or by a charitable institution, it was rather intended that, although they might be of sound mind and body, and actually earning a support by their labor, yet they should have the pension provided, in order to make their labor lighter, or to give a feeling of security above the mere remuneration of such labor.

And this view is not inconsistent with the limitation before described, because, while this evident purpose of the liberality in the grant reaches to some who have more than others in the way of "means of support,"

over and above their earnings, yet in the cases of all, in the administration of the law, such means of support must be shown to be limited before they are declared entitled, so that none who is entirely independent of all labor may be declared a beneficiary of the statute. But this independence can not be made to include that support which grows out of the very state of incapacity or necessity for charitable aid which it was the object of the law to obviate. And when it is held that a widow, because she is insane and is supported in a State Asylum, is "not without other means of support than her daily labor," it is in the nature of a perversion of the meaning of the clause, and an avoidance of the terms of the statute.

Nor will it avail to say that this widow is actually supported outside of any effort on her own part, that being insane it is necessary that she be thus supported, and that such support by the State absolves the General Government from granting the pension as provided. It has been already seen that this is not the kind of support contemplated by the law, and it has never been the policy to deny the right of an applicant to pension simply because of insanity. On the contrary, pensions have uniformly been allowed to the guardians or committees of such insane persons, it being recognized that the guardian or committee is chargeable with the maintenance of his ward, either in an asylum or out of it, or with the preservation of the pension money until such time as the ward may have recovered, or with providing a proper burial if she should die. At any rate, the title of the claimant is not impaired by reason of the fact that the State is legally bound to and does take care of her in an asylum. On the line of these observations may be read the decisions in the cases of Thomas Hynes and Robert G. Dunlap, alias Durdass (5 P. D., 52); Edwin Haskins (8 P. D., 40).

As corollary to the proposition here announced in reference to the widow's title in the case at bar, and as supporting the same, although in a claim of a different class, there may be mentioned the holding of the Department relative to the title of a widow to pension on account of her stepchildren, who are supported at the expense of the State or the public in an institution for the education or care of soldiers' orphans. In such cases the widow is declared by section 4703, R. S., as entitled to the \$2 per month increase for each child, and the Department has held that the same rule applies to the cases of widows under the act of June 27, 1890 (case of Belle Gilbert, 7 P. D., 239).

On the same line, and perhaps more appropriate than any case already cited, as showing why this claimant's title should not be denied, is the case of Anna N., widow of William J. Chin, late of Company F, Tenth New York Infantry, who is a pensioner under the act of June 27, 1890, and is also receiving \$25 per month from the pension fund of the New York fire department. In that case a

Departmental ruling was sought as to the effect of the pension as a fireman's widow upon that as a soldier's widow under the act of June 27, 1890; that is, whether the \$25 per month in the former case would render her nondependent and destroy her title in the latter. In response to such inquiry it was held, under date of June 7, 1899, that the fire department pension was a gratuity, and not a vested right, and it was stated:

If a widow is "without other means of support than her daily labor," which, under a reasonable construction of the law, is property of any kind under her legal control from which a support is derivable, she is entitled to pension under the provisions of the act of June 27, 1890, although she may receive aid from a local charitable organization. Such contributions from charitably-disposed persons, or from local organizations for the purpose of affording relief, should not be regarded as a "means of support" in the sense indicated by the law.

(Opinions in Submitted Cases, p. 265.)

This is the same view of the matter as hereinbefore elaborated. It was recognized that the fire department pension was a gratuity—a charity—and was, in a sense, uncertain, because received solely at the will of the city or State. The same may be said of the care and support afforded the widow in this case by the State insane asylum. And it is firmly believed that the rejection of this claim because she is receiving this kind of support was erroneous and without the purview of the law. The action is accordingly reversed.

PRACTICE—APPEAL—NOTICE—ACT OF MARCH 3, 1899.

HANTCH V. HANTCH.

Appeals in claims under the first, second, and third provisions of the act of March 3, 1899, must be accompanied by due proof of service of notice of the appeal upon the appellee, before such appeal will be docketed and considered as an appeal, and the failure to furnish such proof is ground for the dismissal of the appeal. (See *Ellis v. Ellis*, 11 P. D., 288; *Conover v. Conover*, 11 P. D., 524; and *Loughry v. Loughry*, 11 P. D., 523.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, October 26, 1901.

Walter E. Hantch, late private Company F, Two hundred and first Pennsylvania Infantry, and a pensioner under certificate No. 694382, filed an appeal August 31, 1901, from the Bureau action of August 21, 1901, allowing the claim of his wife, Barbara A. Hantch, for a division of his pension, filed April 19, 1900, and May 15, 1901, on the ground that pensioner was an inmate of National Soldiers' Home, Elizabeth City, Va., and his lawful wife being of good moral character and in necessitous circumstances.

Appeals from Bureau action in cases under the first, second, or third

provisos of the act of March 3, 1899, unaccompanied by due proof of service of a copy of the appeal upon the appellee or his or her attorney of record are defective, and in future such appeals will not be docketed or filed as an appeal, but will be promptly returned to the appellant with the information that before the appeal will be docketed or considered it must be accompanied with due proof of service of a copy of the appeal upon the appellee or his or her attorney of record. (See *Ellis v. Ellis*, 11 P. D., 288; *Conover v. Conover*, 11 P. D., 524; and *Loughry v. Loughry*, 11 P. D., 523.)

As the appeal and papers in this case fail to show service upon the appellee or her attorney, it is accordingly dismissed.

DISLOYALTY—SECTION 4716, R. S.—EVIDENCE—CONSCRIPTION.

WILLIAM TRUELOVE.

The claimant has a record of service in the Confederate army extending over several months. He was afterwards a prisoner of war at Rock Island, Ill., where he enlisted in the Union Army. There is nothing in the record to show that the service in the Confederate Army was not voluntary and the presumption that it was so is not overcome by the evidence filed by the claimant showing that he was a Union man in sentiment and refused to enter the Confederate service until he was conscripted. Rejection of the claim was proper.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
October 30, 1901.*

William Truelove, late of Company I, Second United States Volunteer Infantry, was originally pensioned from date of discharge November 8, 1865, on account of incomplete right inguinal hernia. His name was dropped from the roll April 3, 1890, for the reason the disability had ceased to exist. His name was later restored to the roll upon a renewal of pension on account of disability from disease of mouth result of scurvy. This pension was at first \$2 per month and afterwards increased to \$6 per month which he is now receiving. In the meantime he had been pensioned at \$6 per month from September 19, 1890, under the act of June 27, 1890, and then dropped under that act on account of a record of disloyalty, he having voluntarily enlisted in the Confederate Army. This action of dropping was taken under a departmental decision construing section 4716, Revised Statutes, and the act of March 3, 1877, as applicable to said act of June 27, 1890.

A claim for renewal under said act was filed August 13, 1900, but the same was rejected October 13, 1900, upon the basis of the record which showed service in the Confederate Army. From this action an appeal was taken March 11, 1901, the contention being that claimant's service in the Confederate Army was not voluntary, but he refused to enter said service until he was conscripted, being arrested and forced

to perform duty in a regiment to which he was assigned against his will and consent. It is further urged that claimant had been a consistent Union man and opposed to the secession of his native State of Georgia, and never gave aid or countenance to the Confederate Government; and further, that even after he was conscripted and forced into said Confederate service he sought the first opportunity to be taken prisoner by the Union forces in order that he might escape rendering service which was against his convictions.

In support of the contentions of this appeal there have been filed, in addition to several statements of the claimant, wherein he protests that his service in the Confederate Army was by reason of force and against his will, the affidavits of several friends and neighbors to the effect that they had lived near the claimant for several years previous to the war and know that he was opposed to secession and voted against it, and refused to go into the Confederate Army until forced to do so. Some of the statements of witnesses are as follows:

Willis Slaton testified;

I did not see the arrest made but heard of his being arrested and carried off to Dahlonga, Georgia, where I heard the Confederate forces forced him into the Confederate service. I did not see anything more of him until the fall of 1865. I knew that Truelove was a most uncompromising Union man, and I know he was forced into the Confederate service by the conscript law. I heard he deserted the Confederate service and entered the United States Army of his choice and was honorably discharged. I know that his connection with the Confederate service was wholly against his will; that said Truelove is and ever was a loyal man to the United States and that he did not voluntarily take up arms, nor aid, nor abet the rebellion, but was in favor of its suppression during the period of its continuance.

Jesse Hulsey, testified:

Truelove was a Union man in sentiment, was opposed to the war and secession from the beginning to end, and he refused to go into the Confederate Army until he was conscripted, January, 1863. One Edward Turner, a Confederate conscript officer, came to Truelove's house in Hall County, Georgia, and arrested him and carried him off to Gainesville, where he had a trial before a conscript board. Truelove contended he was too old and tried to keep out of the Confederate service, but I saw the Confederate soldiers have him under arrest and they carried him off. I saw them leave Gainesville and go to Dahlonga, where I heard they put him in the Confederate Army. I saw him no more until the war was over, but I heard in time of the war that said Truelove had deserted the rebel army and gone north into the United States Army.

This witness and others further testify as to the Union sentiments of the claimant and his opposition to service in the Confederate Army. It is further sought to be shown that the conscript laws of the Confederate States were very strictly enforced, that there was no organized conscript command but all conscripts, whether they served voluntarily or involuntarily, were placed in and assigned to military duty with volunteer commands; that there were many conscripts brought into the service under arrest and their names were placed on

the rolls of volunteer companies, when really they were forced there and were not volunteers at all in any sense. This testimony was given for the purpose of showing why the names of conscripted soldiers appear on the rolls as volunteers when they were known Unionists and had no sympathy with the Confederate Government.

The record of this claimant's service in the Confederate Army, as shown by the report of the War Department, is as follows:

Roll of Company H, Sixty-sixth Georgia Infantry, Confederate States Army, dated September 21, 1863, and roll from September 15 to December 31, 1863, shows William Truelove, first corporal, enlisted September 15 at Decatur, Ga., by Captain Belisle, for the war, present. Roll from June 30 to August 31, 1864, private, absent without leave. No further information found.

The record of claimant's service in the Second United States Volunteers, as shown by the report of the War Department, is as follows:

William Truelove was enrolled and mustered into the service as a private on the 13th day of October, 1864, at Rock Island, Ill., in United States Volunteers (Rebs.), to serve one year. On the muster rolls for March and April, 1865 (first on file), he is reported absent in hospital at Fort Leavenworth, Kans., since March 1, 1865. Subsequent rolls to October 21, 1865, report him present. He was mustered out of service November 7, 1865. This man at the date of his enlistment was a rebel prisoner of war in the hands of the United States military authorities.

It will be seen that there is nothing in these records to sustain the claimant's allegations and the testimony of his witnesses as to his having been conscripted into the Confederate Army or that his service therein was involuntary. So far as these records show, the enlistment in the Confederate Army was presumably voluntary. Such a presumption always arises in the absence of any intimation to the contrary in the record itself, and to be overcome there must be the most positive and convincing evidence showing that such service was by compulsion and against the will of the soldier. The mere fact that a soldier was a Union man and opposed to secession and did not enter the Confederate Army until conscripted is not sufficient to show that his service was not voluntary after he got into the army. It may be true, as claimed, that claimant's sentiments were for the Union and that he refused to enter the Confederate Army until he was forced to by the conscript law; yet he may have rendered very willing service while therein, and there is nothing in this case to show that an effort was made to shirk his duty as a soldier or desert at the first opportunity. On the contrary, the record indicates that he served for nearly a year and was afterwards a prisoner of war in the Union prison.

The question here under discussion has been considered many times, and certain well-established rules have been promulgated in departmental decisions. In the case of Augustus H. Longee (7 P. D., 586) the following rulings were made:

Where there is a record of service in the Confederate Army, whether by conscription or otherwise, such record failing to show whether such service was voluntary or involuntary, it will be presumed that service was voluntary; but such presumption may be rebutted.

Where service in the Confederate Army is shown by claimant's record, the burden of proof is on him to show that such service was not voluntary.

Where the records show that a claimant voluntarily engaged in or aided or abetted the rebellion, his claim, under the act of June 27, 1890, should be rejected, under section 4716, Revised Statutes.

A claimant who was conscripted into the Confederate Army may or may not have rendered voluntary service, and where from the records it appears that any service rendered was not voluntary, but wholly compulsory, he is excepted from the operation of section 4716, Revised Statutes.

The sufficiency of the evidence to rebut the presumption of voluntary service in the Confederate Army must depend on the circumstances of each particular case.

It has been pointed out that the rebutting evidence in this case has reference only to the claimant's sentiments with regard to secession and his refusal to enter the Confederate Army until conscripted. It is not believed that this is sufficient to overcome the presumption that his service was voluntary after he got into said army. It is a well-known fact that many soldiers did render voluntary service under just such circumstances. The fact brought out in the evidence that all Confederate regiments were called volunteers and that there were no organized conscript commands does not alter the presumption arising in this case. Some of the records of service in the Confederate Army did show whether a man was conscripted or not. In this case the claimant is shown to have enlisted, and at a point a considerable distance from those named by claimant and his witnesses, and at a date several months later than that on which he is said to have been conscripted.

Another fact which seems to sustain the presumption referred to in this case is that when claimant was enlisted into the United States service, while a prisoner of war, he was placed in a regiment known as rebel volunteers, and it is understood that troops of this character were not sent to fight against the Confederate Army, but were transferred to the far West for service, chiefly against the Indians and to protect post routes. The purpose of this was to prevent the said troops from fighting their own comrades, as well as to reduce the temptation to desert to their old friends. As a matter of fact, such enlistments from Rock Island prison did not always signify great loyalty to the Union any more than they did a strong desire on the part of the men to get out of prison.

Thus, taking the evidence altogether, it is believed that the presumption of claimant's service in the Confederate Army being voluntary is not overcome. The rejection of the claim for renewal under the act of June 27, 1890, because of the prohibition of section 4716, Revised Statutes, was proper, and the same is affirmed.

COMMENCEMENT—SPECIAL ACT—ARREARS.

FIDILLAR WHITE, ALIAS WILLIAM JOHNSON.

The beneficiary under a special act of Congress, if the act does not fix date of commencement, must draw pension from the date of said act.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
October 30, 1901.*

Fidallar White, alias William Johnson, served for about nine months in Company G, Fifty-fifth Ohio Infantry.

A claim filed by him was rejected by you upon the ground of no title on account of Confederate service. The Department, on appeal, had declined to concede title, for the reasons stated in your rejection, May 25, 1895, November 20, 1897, and October 29, 1898.

It appears soldier served continuously for two years in the Confederate service.

By direction of Congress you issued, March 25, 1901, in soldier's name, certificate numbered 1021507, at the maximum rate under provisions of the act of June 27, 1890.

This appellant's original declaration was filed May 23, 1891. In his appeal filed August 5, 1901, and in other papers since filed, he contends that he is entitled to arrears from the date of filing his declaration in the Pension Bureau to March 1, 1901, the date when his pension was made to commence. March 1, 1901, is the date when the special act was approved.

Appellant further contends this special act expressly provides that—

* * * the Secretary of the Interior Department is hereby ordered and authorized to put Fidallar White, alias William Johnson, on the pension roll at \$12 per month, according to the provisions and limitations of the act of June 27, 1890.

The special act reads verbatim as follows:

[Private—No. 569.]

AN ACT granting a pension to Fidallar White, alias William Johnson.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll, subject to the provisions and limitations of the pension laws, the name of Fidallar White, alias William Johnson, late of Company G, Fifty-fifth Ohio Volunteer Infantry, and pay him a pension at the rate of twelve dollars per month.

Approved, March 1, 1901.

Disposing of the last contention, it will be noted that the special act made no mention or reference whatever to the act of June 27, 1890, but directs claimant's enrollment "subject to the provisions and limitations of the pension laws."

It is true certificate was issued under the provisions of the act of June 27, 1890. Soldier's claim was filed under this statute. He has

never filed a claim under any other. He has never alleged title to pension because of wounds or disabilities incurred during his short Federal service.

The provisions of the act of June 27, 1890, have, therefore, not been invoked, as contended by appellant, but it was left to your Bureau to adjust the allowance of appellant's pension, "subject to the provisions and limitations of the pension laws."

What are these provisions and limitations?

Section 4720, Revised Statutes United States, provides, in substance, that where the rate and commencement of a pension allowed by special act are not fixed by such act commencement shall date from the passage of the special act.

The practice is embodied in a ruling of your Bureau numbered 173 and dated February 13, 1886, and is as follows:

When Congress grants a pension by special act, the beneficiary under the special act, if the act omits to fix the date of commencement of the pension thereunder, will be entitled to be pensioned from the date of the special act.

This ruling was based upon the express provisions of the general law. Your adjustment of this issue was in accord with the special act itself, the law governing such issues, and the unbroken practice.

The claimant has no well-founded ground of complaint.

Your adjustment of this claim is approved.

DISABILITY—AID AND ATTENDANCE—SENILITY—HEMIPLEGIA.

GIDEON GANOE.

The claimant is a pensioner at second-grade rating for rheumatism and resulting disease of heart. The claim was rejected on the ground that the present helpless condition is due to senility rather than to pensioned causes.

Held: That the pensioned disabilities can not be ignored as the probable causes of the cerebral hemorrhage to which the existing left hemiplegia is due. The claimant is entitled to the benefit of any reasonable doubt as to whether senile changes were or were not the most potent cause of the cerebral hemorrhage. Action reversed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, October 30, 1901.

Gideon Ganoe, late a private in Company I, Fifth Pennsylvania Reserve Volunteer Infantry, enlisted June 1, 1861, and was honorably discharged with his company June 11, 1864. He is now a pensioner under certificate No. 265239, at the rate of \$30 per month (second grade), on account of rheumatism and resulting disease of heart. He filed a claim for further increase on March 10, 1900, and said claim was rejected by the medical action of April 8, 1901, when it was stated

that his present condition was due in part to other than pensioned causes.

An appeal was taken from this action May 27, 1901, in which it is contended that his present physical condition is directly due to pensioned causes; that he is unable on account of his poverty to provide himself with the attendance his condition requires; that he has been confined to his room and bed for about eleven months; that the rejection of his claim was in contravention of his rights under the law and deprives him of the benefits contemplated by the law.

In support of the claim for increase there was filed within the same month an affidavit of Dr. Jas. W. Irwin, certifying that he found the claimant afflicted with chronic rheumatism to such an extent that he required assistance in dressing and frequently in locomotion; also, slight valvular heart trouble from atheromatous condition of vessels and valves, with the necessary accompaniments of age. Another affidavit of the same physician was filed July 2, 1900, setting forth that the claimant was not able to care for himself in any way, being then troubled with paralysis of the left extremities, due to hemorrhage in brain from atheromatous blood vessels consequent on chronic rheumatism. The date of the stroke of paralysis is given as June 17, 1900, in another affidavit of Dr. Irwin filed with the Department September 20, 1901, which also shows the claimant's continued helplessness, and states that it was "brought on by atheromatous condition of heart and blood vessels due to rheumatism."

It thus appears that the claimant's confinement to bed and the necessity for aid and attendance date from the stroke of paralysis in June, 1900. The medical examination under the claim in contention was made at the home of the claimant on October 26, 1900, by one of the members of the board of surgeons at Huntington, Pa., and the report of objective conditions is as follows:

Pulse rate, 100 lying in bed; respiration, 27 lying in bed; temperature, 98½; height, 5 feet, 7 inches; actual weight, 150 pounds (estimated); age, 74 years.

I find him in bed, helpless, unable to move or turn in bed. He has fairly good use of right arm and by its aid moves the left arm and his legs about, as is necessary. He is quite white and waxy in appearance. Skin relaxed and hangs in folds; muscles very flabby and without power; face flabby and has an imbecile appearance, utterly without expression; speech slow and very hesitating, the answers to questions attempted quite a time after he had time to answer. His mind's action is very sluggish and many of his answers to questions are irrelevant. He is imbecile in mind and decrepit in body. He can not feed himself nor take a drink of water alone. There are tremors of head and extremities. He can not retain nor hold his urine, but frequently allows it to pass unobserved. All joints are exceedingly sluggish in action, crepitate, and the shoulder, elbow, knee, and hip joints crack when moved. The left hand is contracted at wrist, having the appearance of "drop wrist." The fingers are contracted and can not be straightened. This deformity is permanent and progressive. The left arm is wholly helpless, but not paralyzed, and is handled entirely by the right hand. He is so enfeebled from the rheumatic disease that he could not rise in bed to save his life. He protrudes his tongue with uncertainty and

difficulty. When he slides down in bed in his effort to move and relieve himself he can not move back, but I found him, in the temporary absence of his attendant, lying with his feet protruding beyond the foot of the bed. His memory is gone and he is troubled with hallucinations. He is entirely helpless, in body and mind.

The heart is very feeble in action, not intermittent, but hesitating, rhythm uncertain, a perceptible murmur at base. It is impossible to locate the apex beat, but it seems to be most prominent about 2 inches outside the mammary line and in sixth interspace. The organ lies in an angular position in chest, base toward sternum and apex outward, determined only by auscultation. This position is presumably because of the want of integrity of the supporting structures and the position he has assumed for so long a time on his back. He can not lie on his sides. He has an extremely aged look. There is no special cyanosis. The tissues are flabby, but not oedematous. He is habitually short of breath. Although his limbs are not paralyzed, he is unable to stand for a moment, and has to be handled like a little child and all his needs attended to.

He requires the constant aid and help of another person and can not be left alone for an hour a day, either day or night.

I find that he had been trying to get along with his niece and a strong hired girl and one man whom he paid \$1 per day, but he left because of the work, caring for him, and the small amount of the pay.

His needs are urgent, and if he were able to be moved the people in the community would ask his removal to a Soldiers' Home, but he cannot be removed. The help needed is urgent.

This claimant is so totally and permanently helpless from rheumatism, heart disease, and resulting debility that he requires the regular personal aid and attendance of another person and is entitled to \$72 per month. (He cannot live long.)

The position of the medical referee in adhering to the action of rejection is stated in an opinion dated September 30, 1901, as follows:

While it has been shown that this aged claimant is in a deplorable condition of mental and physical helplessness, and requires constant aid and attendance of one or more persons, yet lacks the means to pay for the required help, still it has not been shown that his pensioned disabilities have caused his helplessness or added in any considerable degree to it. His attending physician, Dr. Irwin, testified that he was paralyzed on his left side. The examining surgeon, Dr. Brumbaugh, stated: "The left arm is wholly helpless, but not paralyzed."

The facts as they appear from the history of the case are that arterial degeneration was evident in 1896. According to Dr. Crawford's affidavit, filed October 12, 1896, he had been the claimant's physician for fourteen years, and knew him to be afflicted with "chronic rheumatism and a decided tendency to softening of the brain, due to a number of paroxysms of apoplectic congestion of the brain, * * * with very grave inclinations or strong predisposition to apoplexy or paralysis. His cerebral centers were so affected that he is barely able to exist or live at all."

The claimant is now reported as "imbecile in mind and decrepit in body." He was 74 years of age when last examined and had "an extremely aged look." There is apparent loss of power in the left arm and the lower extremities, and incontinence of urine from loss of power in the bladder.

Why the examining surgeon states that this is not paralysis is not clear.

The symptoms indicate probable softening of the brain and general paresis, due to the degenerative changes of age.

The difference between the attending physician, Dr. Irwin, and the examining surgeon, Dr. Brumbaugh, as to the existence or non-existence of paralysis should be reconciled when it is understood that

there was a distinct attack of apoplexy on June 17, 1900, with resulting hemiplegia, since which date the claimant has been confined to his bed. The instructions for the examining surgeon did not include any reference to such paralysis and he found the claimant without his attendant and unable to give any account of his case. If the certificate had been returned, the examining surgeon would doubtless have rectified the apparent contradiction.

Two questions are here presented for consideration: First, is the claimant's condition from rheumatism and disease of heart alone sufficient to make necessary the aid and attendance of another person? Second, is the existing paralysis due to the pensioned diseases?

The affidavit of Doctor Irwin, filed March 31, 1900, and the report of the examining surgeon seem to warrant an affirmative answer to the first question; but, as the examining surgeon seems to have been in ignorance of the clinical history of the case and attributed the claimant's helpless condition wholly to rheumatism and disease of heart and resulting debility, the second question is of the greater importance and the whole matter really hinges thereon.

The medical referee states:

* * * it has not been shown that his (the claimant's) pensioned disabilities have caused his helplessness or added in any considerable degree to it. * * * arterial degeneration was evident in 1896. * * * The symptoms indicate probable softening of the brain and general paresis, due to the degenerative changes of age.

As already set forth, the medical evidence and the report of the examining surgeon do not appear to justify the above statement of the medical referee. Dr. Irwin stated, in March, 1900, that by reason of disability from chronic rheumatism the claimant required assistance in dressing, etc.; he subsequently certified on two different occasions that a stroke of paralysis, in June, 1900, was due to atheromatous blood vessels consequent on chronic rheumatism. Dr. Brumbaugh stated in concluding his report that the claimant is totally and permanently helpless from rheumatism, heart disease, and resulting debility.

It is stated by the medical referee that arterial degeneration was evident in 1896, and he cites the affidavit of Dr. Crawford as the authority for this statement. Arterial degeneration or disease is the usual cause of cerebral hemorrhage, and senile changes are generally admitted as the most frequent cause of such degeneration. But other direct causes are recognized, and among these are both rheumatism and organic disease of the heart, the disabilities for which this claimant is pensioned. These diseases are also recognized as indirect causes of vascular changes. Cardiac disease is frequently the exciting cause of the immediate rupture of a cerebral vessel giving rise to hemorrhage. In *A Treatise on Surgery by American Authors* (Park) it is stated:

One-half or more of the cases of atheroma have been known to have been preceded or accompanied by rheumatism or gout, the former occupying by far the larger proportion of the two.

In Tyson's Practice of Medicine it is stated:

The "fatty erosion" of the intima, which is the next most frequent cause of vulnerability (in the cerebral arteries), is favored by age, by chronic interstitial nephritis, and the overstrain of the vessels, due to hypertrophy of the left ventricle, so often associated with that disease as well as with valvular heart disease.

The reports of the official examinations in 1888, 1890, and 1892 showed marked evidences of disability from rheumatism and serious organic disease of heart, and Dr. Crawford stated in his affidavit in 1896, referred to above, that the heart was then "much impaired." It is not improbable that the tendency to softening and the number of paroxysms of apoplectic congestion of the brain to which he refers were directly due to the condition of the heart or to embolism and thrombosis. It is quite evident that the claimant was most seriously disabled for a long period before the arterial degeneration was shown as a possible factor in the case.

Some doubt seems to be implied in the conclusion, as stated, of the medical referee relative to the nature of the existing conditions and the cause thereof.

After a careful consideration of the evidence the Department is led to the conclusion that the pensioned disabilities can not be ignored as the probable cause of the cerebral hemorrhage to which the existing left hemiplegia is due. The claimant is entitled to the benefit of any reasonable doubt as to whether senile changes were or were not the most potent cause of the cerebral hemorrhage. The action of the Bureau is therefore reversed and the readjudication of the claim in accordance with the views herein expressed is directed.

DECLARATIONS AMENDATORY AND SUPPLEMENTARY—SUFFICIENCY.

NICHOLAS GILL.

Claimant in his first declaration alleged that while in the service and in line of duty he incurred "injury of right arm while on detail duty as blacksmith."

Held; That his said allegation is sufficient to include any disability of the right arm incurred in service and in line of duty, including rheumatism."

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, October 31, 1901.

Nicholas Gill, late private Company E, Fifteenth United States Colored Volunteer Infantry, appealed, by his attorneys, March 13, 1899, from the Bureau action of January 19, 1897, approving his old-law claim for rheumatism and dating the commencement of his pension from April 8, 1891, the date on which he filed an affidavit first alleging rheumatism, and rating him four-eighteenths for rheumatism and resulting disease of heart to August 2, 1893, and twelve-eighteenths thereafter, and withholding the issue of a certificate unless the claim-

ant, who was then in receipt of a pension under the act of June 27, 1890, at \$12 per month from July 21, 1890, should elect to take certificate under his old-law claim.

It is contended that claimant's old-law pension should have been made to commence December 16, 1889, when he filed his first declaration, and that a short certificate should be issued covering the period from December 16, 1889, to July 21, 1890.

Claimant filed his first declaration December 16, 1889, in which he alleged that while in the service and in the line of duty, about 1863, he incurred "injury of arm while on detail duty as blacksmith."

April 8, 1891, he filed the following affidavit:

That he is the claimant in the above-described claim and in explanation of his original declaration for pension, filed December 14, 1889, he desires to state that the disability contracted by him while in the service and from which he now suffers is rheumatism instead of injury of arm, and that the same was contracted about October, 1864, and caused by exposure and hardships incident to the service, and he desires to correct and amend his declaration now on file so as to base his claim for pension on rheumatism instead of injury to arm.

This affidavit appears to have been treated by the Bureau as an original declaration and not as an amendment of his original declaration.

The board of surgeons who first examined claimant reported as follows:

There is stiffness of right arm amounting to partial ankylosis. The arm can not be straightened, except to about an angle of 45 degrees. The shoulder is also slightly stiff, due probably to rheumatism.

Claimant is reported as having stated to this board that—

while shoeing a horse he had his arm wrenched, and since then he is unable to straighten his arm. He also says his shoulder was injured.

This board recommended a rating of six-eighteenths for disease of arm and shoulder.

He was next medically examined April 1, 1891, when the board reported no evidence of rheumatism and recommended a rating of six-eighteenths for old age only.

He was next and last medically examined August 2, 1893, when the board reported:

We find hypertrophy, impaired motion, and stiffness right shoulder, with atrophy all muscles of that shoulder and arm. Impossible to elevate elbow. Grasping power feeble in right hand, which is softer than left, showing very little use.

Left shoulder has crepitation and perceptible impairment motion. Atrophy muscles lumbar region, sacrum and right hip. Compelled to use cane in walking, carries it in left hand.

They recommend a rating of eighteen-eighteenths for rheumatism.

In the case of Henry S. Boardman (3 P. D., 44), it was held that—

Where the disease of rheumatism, for which soldier is pensioned, was not specifically mentioned in his original declaration filed September 4, 1876, but, in an affidavit filed subsequent to July 1, 1880, was named and proved to be the real cause of his disability, it is held, inasmuch as the disability, described by claimant in his

original declaration, is identical with the nature and effects of rheumatism, for which pensioned, the aforesaid affidavit should be accepted as an amendment of * * * the original declaration.

That was a case involving arrears of pension, and the original cause of disability alleged in the declaration was severe cold following measles.

The Boardman case was cited and followed in the cases of William Whitaker (Ibid, 68); and Oliver P. Pierce (7 P. D., 91). See also cases of Albert Ordway (4 P. D., 90); Anthony W. Deffenbaugh (5 P. D., 246); and Alphonso W. Ellis (11 P. D., 93), which was cited and followed in the case of Felix Myers (Ibid, 315).

It is stated in the Treatise on Practice of the Pension Bureau, page 10, paragraph 3, that—

Often one disability is alleged and a different one proven. This may occur for various reasons and for such as should not prejudice the case. Claimants and their agents are not often physicians, and may give an improper diagnosis of their case. A certain disability may be described and called by an incorrect name, which fact should not militate against a case. Often in such cases no change is required in the declaration. Again, it may be necessary to modify the declaration in accordance with the facts established; in such cases the claimant's interest should be carefully guarded and he be promptly notified.

In the case under consideration the question as to whether the condition of claimant's right arm was due to rheumatism was not clear to the board of surgeons who examined him, and they expressed the guarded opinion that it was "probably" due to rheumatism, but recommended a rating for "disease of arm and shoulder."

The Department is of the opinion that claimant's allegation in his first declaration was sufficiently broad to include any disability of the right arm incurred in service and in line of duty, including rheumatism, and that his said affidavit of April 8, 1891, should have been treated as amendatory of his said declaration, and not as an original declaration.

The action appealed from is accordingly reversed.

DIVISION OF PENSION—ACT MARCH 3, 1899—DESERTION—SEPARATION.

CATHERINE FLEAGLE *v.* JOSIAH FLEAGLE.

Claimant at the date of filing her claim for one-half of soldier's pension under the act of March 3, 1899, was living separate and apart from her husband pursuant to a mutual agreement for separation executed March 10, 1897, which agreement was in full force and effect. She was, therefore, not in position to charge her husband with desertion as his absence from her is with her consent and in accordance with her express agreement. *Stewart on Marriage and Divorce*, par. 256; 9 *Am. and Eng. Ency.* (2d ed., 767); *Stoffer v. Stoffer* (50 Mich., 491).

Assistant secretary F. L. Campbell to the Commissioner of Pensions, November 25, 1901.

Catherine Fleagle, wife of Josiah Fleagle, late private, Company C, Sixth Maryland Infantry, and a pensioner under certificate No.

496547, appealed July 25, 1901, from the Bureau action of July 8, 1901, rejecting her claim for one-half her husband's pension, filed December 14, 1901, under the act of March 3, 1899, on the ground that pensioner was not chargeable with desertion, as separation existed by virtue of a mutual agreement entered into March 10, 1897.

Claimant contends that said agreement for separation was signed by her as a means of protection from the annoyance to which she had been subjected by said pensioner and because of fear of personal violence and injury at his hands; that because of long-continued persecution and conduct unbecoming a husband and a father she feared for her personal safety and that of her children, and that it was not intended in signing such agreement to sign away her right as the legal wife of said pensioner.

Pensioner denies the allegations contained in her appeal and relies upon the mutual agreement for final separation, which he alleges was prepared by an attorney of her own selection and not by his effort; that at the time of said separation he owned real and personal estate to the value of \$2,000, and in accordance with the settlement then made claimant was given \$100 of personal property, and upon the payment of \$800 he executed and delivered to his oldest daughter a deed for all his real estate, valued at \$1,800 to \$2,000, which it was then understood his daughter was to convey to claimant, which he testifies he believes she has done, thus placing his wife in possession of all his real estate, and that his whole income from all sources, exclusive of his pension, will not exceed \$60 per annum; that his health is broken and that he is physically unable to perform manual labor; that he has, since said agreement for separation, strictly conformed to its terms and conditions, and that she is debarred by said agreement from making any demand upon him whatever.

Claimant in her declaration alleged that her said husband "abandoned and deserted his lawful wife and family some time during the year of 1895, or 1896—exact date not known."

The evidence shows that claimant and pensioner entered into a mutual agreement for final separation March 10, 1897, wherein among other covenants is the following:

And in consideration of the premises and of the sum of \$1 paid by said Josiah Fleagle, to said Catherine A. Fleagle, the receipt whereof she doth hereby acknowledge, she, the said Catherine A. Fleagle, doth hereby release and discharge the said Josiah Fleagle from all liability to support and maintain her, or to contribute anything whatever toward her support. * * * and promises and agrees that she will not at any time during her natural life, if the said Josiah Fleagle shall faithfully perform the agreements and covenants above set forth to be done and performed by him, institute any proceedings to compel him to contribute to her support * * *

This contract was executed in the State of Pennsylvania where contracts of this nature are recognized as valid. (See Hitner's appeal, 54 Pa., 110.)

Pensioner contends that he has "strictly conformed to the terms and

conditions of said agreement," and this is not denied by claimant, but she asks to relieve herself from the agreement on her part, by alleging in effect, personal duress.

Duress of the person is either by imprisonment, or by threats, or by an exhibition of force which can not apparently be resisted, and duress is said to exist when one, by the unlawful act of another is induced to make a contract or perform some act, under circumstances which deprives him of the exercise of free will. (*Hackley v. Headley*, 4 Mich., 569-574.)

The evidence as to duress, or undue influence exercised by pensioner, rests upon the affidavit of claimant. Pensioner in his affidavit denies the truth of the allegations of the claimant.

Aside from the questionable propriety of this Department attempting to pass upon the illegality of a contract, fair and regular on its face, and under which claimant has evidently received certain pecuniary consideration, and which contract has remained in force for several years, with its validity unquestioned, so far as the evidence in this case discloses, it is evident that no sufficient showing has been made which would justify a court of equity to set aside the contract on the ground of duress.

The burden of proof, to establish the statutory desertion named in the act of March 3, 1899, is upon the claimant, and she has failed to show that the articles of separation were not in full force and effect December 14, 1900, the date of filing her said application.

If said contract was then in force the claimant is not in position to charge desertion. The period of desertion is broken and terminated where the parties consent to a separation. (*Stewart on Marriage and Divorce*, par. 256; 9 Am. and Eng. Ency., 2d ed., 767.) A separation commenced and continued by mutual consent or agreement does not constitute desertion. (*Ibid.*, 775, and note 4.)

As stated by the court in the case of *Stoffer v. Stoffer* (50 Mich., 491):

If the separation had been by voluntary arrangement, the living apart, in pursuance of it, could not be called desertion.

As held in the case of *Rothery v. Rothery* (11 P. D., 77):

The word "desert" in said act of March 3, 1899, is used in its general legal sense, and means the willful withdrawal of one of the married parties from the other, or a voluntary refusal of one of the married parties to renew a suspended cohabitation without legal justification.

(See also *Ibid.*, 377, and *Richards v. Richards*, *Ibid.*, 90.)

As the evidence in this case wholly fails to establish the fact that pensioner deserted appellant within the meaning of said act of March 3, 1899, the action appealed from is affirmed.

Copies of this decision will be forwarded to the parties hereto, or their attorneys of record.

INCREASE—PATHOLOGICAL SEQUENCE—PARALYSIS—DISABILITY

THOMAS C. JOHNSON.

The basic principle upon which claims for straight increase under the general law are adjudicated involves, primarily, the question as to whether or not the degree of disability due to pensioned cause or causes, per se, has increased to such an extent as to warrant the allowance of a higher rate of pension, and secondly, the question as to whether or not some sequence has arisen which increases the degree of disability, and, consequently, warrants an increase in rate.

In the case at bar the essential feature of this principle appears to have been ignored in the adjudication of the pensioner's claims for increase filed April 16, 1896, and June 12, 1897, respectively, each of which was rejected principally upon the ground that the paralysis of his left side could not be accepted as a result of the disease of spine for which he is pensioned.

In the judgment of the Department, the refusal on the part of the Bureau to accept the paralysis of the claimant's left side as a result of the disease of spine for which he is pensioned was justified by the history of the case furnished by the claimant himself; but it is held that the refusal to allow an increase in rate from third to second grade for disease of spine alone, under each and both of said claims, was error, as it was clearly shown at the medical examinations made pursuant to such claims that he was unable to perform any manual labor by reason of said pensioned cause.

All adverse actions in the said claims, both of the Department and the Bureau, are rescinded and set aside.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
November 25, 1901.*

The appellant in this case, Thomas C. Johnson, late sergeant, Company C, Tenth Missouri State Militia Volunteer Cavalry, and Company C, Third Missouri State Militia Cavalry, is now pensioned at the rate of \$24 per month (third grade) for "disease of spine."

In his original declaration for pension, filed June 17, 1884, he claimed that he contracted "disease of spine" at Mexico, Missouri, in 1862.

On December 30, 1887, a certificate of pension at the rate of \$4 per month for "spinal irritation" was issued to the claimant. The legal approval spread on the brief-face was for "disease of spine," but the medical approval spread thereon was for "spinal irritation," and the original certificate in the case was issued, as above stated, in accordance with the said medical approval. The rate in the case was subsequently twice increased for this same cause of disability, but under a reissue made May 7, 1891, to change the name of the disability and to allow a rerating from the date of filing the said original declaration the cause of the disability was, very properly, changed to "disease of spine." Spinal irritation, or spinal neurasthenia, has no recognized morbid anatomy, but is a term used to cover a somewhat indefinite group of nervous symptoms, which may be either general or local, but which are almost wholly subjective; whereas in the case at bar there were well-marked objective signs of some organic lesion of the spinal cord.

This fact is very clearly shown by the findings of the examining surgeons at the first medical examination made of the soldier after his original claim for pension was filed. Although his said claim was filed June 17, 1884, he was not examined until July 27, 1887, at which time he made the following statement to the board of examining surgeons:

I feel a numbness along my spine nearly all the time, also a good deal of same in my left shoulder. I can't get my left hand up to my head. I am inclined to tremble or shake all the time—left side more than the right; * * * more or less constant pain in back of my head, and can't turn my head to either side without turning my body. I can work a little sometimes, but only a little.

The objective conditions described in the certificate of such examination were as follows:

A man who is certainly much disabled. He is inclined to stand with his head a little pitched forward and seemingly nearly fixed in that position. Complaints of inability to move but little to right or left while standing. Apparently every muscle quivers or trembles more or less. Whenever he attempts to raise a hand to his head this trembling is very distinct. In attempting to put left hand to head it always inclines to go back of head. While standing during examination his pulse increased from 92 to 130; respiration not much changed. * * * His left hand seems a little puffed, but not enough to make any difference in measurements between it and right. Though full in flesh and of good color, he certainly can not perform much hard labor. As compared with loss of a hand or foot, we believe him fully sixteen-eighteenths disabled.

As above stated, the claimant was—under these findings—granted a pension of but \$4 per month, for "spinal irritation." And, as also above stated, the rate for said cause of disability was subsequently twice increased.

However, in the consideration of a claim for rerating, filed October 30, 1890, the medical referee, on April 9, 1891, expressed the following opinion as to the propriety of the aforesaid actions in the premises:

This claimant was discharged on surgeon's certificate of disability for "chronic rheumatism of lower extremities, together with extreme nervous debility and prostration." He claimed pension for "disease of spine," and claim was so approved. The medical examiner changed the name of disability to "spinal irritation," and rated him at four-eighteenths, believing a part of the disability described in the certificate to be due to rheumatism.

He was increased to \$8 per month from September 5, 1888, although board rated him at third grade, the examiner still believing that the greater part of the disability was due to the rheumatism, as shown in the certificate of disability.

In an examination made October 8, 1890, it was clearly shown that claimant's disability was all due to disease of spine, and not to rheumatism, and he was increased to third grade from that date.

It appears from these facts that an injustice has been done claimant, and it is suggested that a reissue be made to change name of disability to disease of spine and to correct rate, and that he be allowed sixteen-eighteenths from date of filing claim to September 5, 1888, and third grade thereafter.

Formal action in accordance with the foregoing views of the medical referee was spread on the brief-face April 23, 1891, since which

time several claims for increase have been filed, but each one has been promptly rejected. In one of these claims, filed April 16, 1896, he alleged that he was "entitled to an increase of pension on account of the increase of disability for which pension was granted," and that—

* * * he is now paralyzed throughout the left side, resulting in such helplessness as to require a great part of the time the aid and assistance of another person, and that said paralysis is due immediately to the disease of spine for which he is pensioned.

This claim was rejected December 26, 1896, on the ground that the existing rate in the case was fully commensurate with the degree of disability due to pensioned cause, and that the paralysis of left side could not be accepted as a result of such pensioned cause, namely, "disease of spine."

An appeal from this action was taken April 3, 1897, wherein it was contended that such action was contrary to the facts presented and at variance with the findings of the examining surgeons at two separate medical examinations; that the medical evidence filed in the case established the fact that the paralysis which afflicts him is the direct result of the disease of spine for which he was originally pensioned, and that he should be granted the increase which the law allows one in his helpless condition.

In response to a call upon the Bureau for a report as to the validity of the aforesaid contentions the following opinion of the medical referee as to the medical aspects of the case was submitted May 8, 1897:

The appeal in this case is for a reconsideration of the last action rejecting increase and refusing to admit paralysis of the left side as a result of the pensioned disability, disease of the spine. From the claimant's statements to the examining board, it is shown that the paralysis is of cerebral origin, a genuine apoplexy, and the fact that the left side of the face is involved, as shown by medical examination, confirms this. The apoplectic stroke causing the paralysis can not be regarded as a pathological result of spinal irritation, and consequently the rejection of the claim for increase is adhered to.

And on May 22, 1897, the Department promulgated a decision affirming the rejection of the said claim for increase. The merits of the claim under consideration were, however, not discussed in such decision. It was merely held therein that the question at issue was "purely a medical one," and that inasmuch as it "had been decided adversely by the medical referee," the Department, "after a careful review of the evidence, aided by the foregoing medical statement, failed to discover any error" in the action appealed from.

In permitting the opinion of the medical referee to control in questions of this character at that time the said departmental action was, perhaps, in accord with precedents established in prior departmental decisions on questions of like character; but such practice no longer obtains in matters of this kind; neither were the rules laid down in such decisions held to be inviolable, nor so absolute as to admit of no

departure therefrom. The reasons for making this statement at this time will appear herein later on.

In another claim for increase, filed June 12, 1897, the pensioner alleged that he was so totally and permanently disabled by reason of pensioned cause—disease of spine—as to require the frequent and periodical personal aid and attendance of another person.

This claim was rejected October 14, 1897. According to the medical approval spread on the brief face on that date, the rejection of such claim was based on the aforesaid opinion of the medical referee as to the propriety of the rejection of the said former claim for increase and upon the decision of the Department affirming such adverse action, as above set forth.

It would seem, though, that inasmuch as the claimant was given a very careful and thorough medical examination under his more recent application for increase, that such claim should have been adjudicated in accordance with the conditions manifested at the said examination rather than in accordance with opinions theretofore expressed as to the merits of a former claim for increase.

No further action in the premises appears to have been taken by the pensioner until January 14, 1899, when he filed an appeal from the rejection of the claim for increase filed June 12, 1897, and asked for the reconsideration of departmental decision of May 22, 1897, affirming the rejection of the claim for increase filed April 16, 1896.

Considering, first, the appeal from the most recent adverse action in the case, it is noted that the appellant contends that the extent of his disability on account of disease of spine is such as to wholly incapacitate him for the performance of any manual labor whatever; that it is of such a nature as to necessitate the aid and attendance, at times, of another person—in dressing, undressing, and in getting about—and that his disabilities are fully described in the certificate of the last medical examination to which he was subjected, which disabilities are attributed by the examining surgeons to the disease of spine, and an increase in rate is recommended in consequence thereof.

The said examination was held September 6, 1897. The claimant stated to the examining surgeons that the disease of spine for which he is pensioned and on account of which he claimed an increase was the result of the kick of a horse in May, 1862; that he was kicked in the back of the neck; that his urine dribbles from him constantly, and that he is totally disabled for the performance of any manual labor.

The objective conditions found at such examination were in part as follows:

Pulse rate, 100; respiration, 32; temperature, 97; age, 63 years. Could not get his height or weight. * * *

There is evidence of a former injury at the junction of the cervical and dorsal vertebrae. The spinous process of the seventh cervical vertebra has been fractured, and

there is osseous thickening. Great pain is complained of on pressure over this point. Very tender on pressure along the entire course of the spine; can scarcely allow the coccyx to be touched; when he sits down has to have a cushion with central depression, to avoid pressure on coccyx. There is almost total loss of sensation in both lower extremities from above hips down; also in left arm and shoulder; complains of cushion feeling when attempting to stand on feet, and says his limbs feel as though they were asleep.

There is almost complete paraplegia.

There is absence of knee jerk and coordination of movements is impaired. There is paralysis agitans of left hand and arm and of head. There is aphasia and loss of consciousness at times. He can not protrude tongue, and it has the same motion that his left hand has.

There is a general cedematous appearance of the entire body; great edema in lower extremities from knees down; pitting on pressure. * * *

Heart's action is irregular in rhythm, feeble in force, and accelerated in action; sounds muffled, second sound not heard at intervals; evidence of hydrothorax and probably atrophy of heart walls; could not get pulse standing or after exercise.

The paralysis evidently due to syringo-myelia, the result, primarily, of traumatism, although we have not the muscular atrophy in the extremities of this man that is usual in such cases. It might be evident were it not for the cedematous condition. (Strumpell, p. 572, and Sajous on Disease or Injury of Spinal Cord.) * * *

There is continual dribbling of urine, so that he has to use cloths to keep his clothing and bed dry. Examination of urine reveals: Color, clear; reaction, acid; sp. gr., 1.008; no sugar, but one-eighth volume is albumen. The dropsy is probably due to both the albuminuria and to the cardiac trouble.

No evidence of vicious habits or of syphilis or sequelæ.

Claimant is not able to clothe or undress himself, to feed himself, or to obey the calls of nature without the aid of some other person. This claimant is so disabled from disease of spine (paraplegia, hemiplegia, etc.) as to require the frequent and periodical aid and attendance of another person.

The president of this board has been the claimant's family physician almost continuously, and treated him for the injury he received in July, August, and September, 1862, and in June and July, 1863, and at intervals since.

That the claimant was totally and permanently incapacitated for the performance of manual labor at the date of the said medical examination is shown beyond question by the foregoing description of the objective conditions manifested thereat, and that he also required the frequent and periodical personal aid and attendance of another person at that time by reason of such conditions is, it is thought, equally well shown. Therefore the only question that remains to be determined is, To what extent were those conditions due to the disease of spine for which he was then and is now pensioned? He contends that they were clearly shown to be wholly due to such pensioned cause, while the Bureau, upon the advice of the medical referee, holds by implication, but not directly, that said conditions are largely the result of cerebral apoplexy. In the opinion of the examining surgeon who made the last medical examination of the appellant the disease of spine is responsible for all existing conditions. His diagnosis of syringo-myelia, however, does not appear to be sustained by the symptoms described in his certificate of examination, as but few of

such symptoms can be classed among the phenomena regarded as pathognomonic of the disease diagnosticated, besides which there are several other neuroses with which the disease in question might be confounded. Furthermore, syringo-myelia is held by the most eminent neurologists to be primarily a congenital disease. Thus, his theory that it was present as the result of traumatism is thought to be error.

As above stated, the Bureau holds that cerebral apoplexy and resulting left hemiplegia is the chief cause of disability in the case, and that the said apoplectic stroke "can not be regarded as a pathological result of spinal irritation." At the time this opinion of the medical referee was expressed the appellant was pensioned for "disease of spine"—the medical approval in the case having been corrected.

In this same opinion the medical referee also says:

From the claimant's statements to the examining board, it is shown that the paralysis is of cerebral origin, a genuine apoplexy.

The paralysis referred to is, of course, the left hemiplegia, which the claimant alleged in his application for increase, filed April 16, 1896, as a result of disease of spine. As a matter of course, the Bureau is correct in holding that cerebral apoplexy "can not be regarded as a pathological result of spinal irritation," or, for that matter, from any organic disease of the cord.

As will be observed, the only basis for ascribing the condition of the soldier's left side to cerebral apoplexy, aside from the fact that the left side of his face was said to be involved in the paralysis, was the claimant's own statement to the examining surgeons, as there is no corroborative evidence upon this point on file with the papers in the case.

If the claimant's statement as to the actual occurrence of one or more strokes of apoplexy is accepted as true, as appears to have been done in this case, so, also, must his statement as to the date or dates of the occurrence of such apoplectic stroke or strokes be regarded as correct. According to the report of the examining surgeon by whom he was examined in 1893 he said:

On December 25, 1889, I had a paralytic stroke, and a second stroke on December 25, 1890, affecting my entire left side.

No mention of a paralytic stroke appears to have been made to the board of examining surgeons by which he was examined October 8, 1890, although the first stroke is said to have occurred in 1889, nearly one year previous. He did, however, repeat his story as to the strokes of paralysis to the board of surgeons by which he was examined in 1896. The claimant also stated to the surgeon by whom he was examined in 1893, March 10, as follows:

In 1862, near Louisiana, Mo., I was attacked with a severe pain in my back and neck, and soon the muscles of my back became stiff and my head was drawn backwards until my feet and head almost touched, and as I lay on the bed a man could crawl under my back.

This statement of the soldier would indicate a condition of opisthotonos ("a tetanic condition of the muscles, especially of the back, whereby there is an arching backward of the trunk, which rests upon the head and heels."—Gould) at that time—a condition that is seen in tetanus or "lockjaw," also in hydrophobia, hysteria, and other tetanic conditions.

One other statement of this appellant seems worthy of more than a passing glance, as it is not in harmony with his sworn allegations as to the origin of the disease of spine for which he is pensioned. According to the certificate of the last medical examination to which he was subjected, September 6, 1897, he told the examining surgeon that the said disease was the result of a kick from a horse in the back of his neck while in the service, he thought, in May, 1862. And the examining surgeon reported that he found evidence of a former injury at the junction of the cervical and dorsal vertebræ. Whereas in the certificate of the medical examination of March 10, 1893, it is stated that there was no scar or other evidences of an injury of spine, but that there was a small scar 1 inch long over left temporal bone, but neither tender nor adherent, though there was a slight depression from loss of soft parts, which, the claimant then said, was "the result of a kick of a horse many years ago." It is shown, however, by the several certificates of medical examination on file in the case that the pensioner is suffering more or less from mental impairment, and it is not at all unlikely that his memory is none of the best. But, as hereinbefore stated, if the appellant's statements relative to the two strokes of paralysis are accepted as true, his statements as to the dates of their occurrence should be given equal credence. And inasmuch as he says that the first stroke occurred December 25, 1889, how are the conditions both complained of and manifested at the medical examinations held in the premises July 27, 1887, and September 5, 1888, respectively, to be accounted for? The report of the examination of July 27, 1887, has already been fully set forth herein.

At the examination of September 5, 1888, the claimant made the following statement to the examining surgeons:

I have a feeling as though my left side, leg, arm, face, and head were asleep all the time, and am never without some pain in left side of face and head, and some nights my left arm and leg pain me so that I can not sleep. My left eye frequently jerks toward the outside. I have more or less constant feeling of heat in my left breast and in region of my heart. About once a week I have a spell of difficulty in breathing and have to lie down. Any excitement will bring it on. Have had no desire for sexual intercourse for over three years. * * * You see how I shake. I can do nothing with my left hand. * * * Were it not for my family I would much rather be dead. Always a good deal of pain at back of neck. My fingers of left hand are always numb, as from cold, so that I can hardly feel anything, but know when I touch anything.

The objective conditions manifested at this examination were, in part, as follows:

Slight tenderness on percussion along 4-5 and 6 dorsal vertebræ. Tender to touch and particularly tender to percussion over cervical vertebræ. Measurements of legs and thighs about the same. Right arm a little larger than the left. Right forearm at largest point nearly an inch larger than left. Right hand a little bit harder than left, which is soft and moist, not cold. Left hand and arm shake about as much as any case we ever saw. Can't come anywhere near picking up a match; occasionally will get a pocketknife between two fingers and hold it; seems to have no grasping power whatever with the left hand. Right hand and arm shake a little, but nothing compared to left. Grip is fairly good with right hand excepting index finger, which seems weak and will not quite fully flex into palm. His head is in almost constant motion, and left eye occasionally twitches; upper lid very slightly fallen; eye is constantly suffused and sclerotic, somewhat reddened; can not read with left Snellen's D-12 at more than 18 inches, and read Snellen's D-6 easily at 8 feet with the right. Find difficulty in using ophthalmoscope; light seems to hurt the eye, or for some other reason the lid and ball are in constant motion, or lid spasmodically closed, and we can get only an occasional glimpse of retina, which is not as clear as right; seems a little darker and duller. Eye waters very freely under the light. Has somewhat the gait of one who is drunk; swings the left foot out a little, and occasionally comes down in somewhat the gait of locomotor ataxia for a step or two. Yet it is not that. He always steadies himself with his hands when he gets up to start off to walk. When sitting can not cross left knee over right without help. When crossed, striking tendons seems, about four times in five, to have no effect upon the foot whatever, unless struck hard enough to produce pain. When right is crossed over left, the foot responds at every trial.

In an affidavit, filed March 10, 1888, we find the claimant alleging that—

* * * he is suffering from and with spinal irritation, which has produced disease of his entire nervous system—at times producing symptoms of partial paralysis of left side. * * *

If, as stated by the medical referee, the condition of the appellant's left side was in 1896-97, and is now, the result of one or both of the aforesaid alleged apoplectic attacks of 1889 and 1890, respectively, to what are we to ascribe the physical signs referable to that region described in the certificate of examination quoted above? That a cerebral hemorrhage resulting in paralysis of one side might complicate preexisting conditions is, of course, among the probabilities, and from the history of the case, as given by the claimant himself, it appears that such a complication as the one referred to has occurred in this case. There is, at least, too large an element of doubt in the matter to warrant its being resolved in favor of the appellant's contentions at this time.

As a matter of course, the conditions existing in 1888, and prior thereto, can not affect the pensioner's title to an increase under his claim therefor now under discussion, except in so far as the facts relative thereto referred to above lead up to and corroborate the opinion that the Department has reached in the premises, namely: That, after

eliminating entirely the effects of the alleged cerebral apoplexy, the appellant is still shown to be wholly incapacitated for the performance of any manual labor by reason of the disease of spine for which he is pensioned and the results thereof. It is shown that he is suffering from paraplegia as well as from hemiplegia, and from that most distressing condition, incontinence of urine—there being “a continual dribbling of urine, so that he has to use cloths to keep his bed and clothes dry,” as reported by the examining surgeon—a condition more referable to disease of spine than to disease of brain. He also alleges total loss of sexual desire, which, while nonpensionable, is indicative of a serious lesion of the cord. The cause of the severe coccygodynia manifested at the last medical examination is not shown, but can not be ascribed to the alleged brain lesion, and, perhaps, not to that of the cord, but this is not so certain. However, it having been shown to the full and complete satisfaction of the Department that the appellant was wholly unfit for the performance of any manual labor—by reason of disease of spine—at the date of the medical examination held September 6, 1897, in pursuance of his claim for increase filed June 12, 1897, the rejection of such claim by the Bureau is hereby reversed and set aside, and the said claim will be readjudicated in accordance with the views herein set out.

Referring now to the motion for the reconsideration of departmental decision of May 22, 1897, affirming the rejection by the Bureau of the appellant's claim for increase filed April 16, 1896, it will be recalled that in referring to such decision earlier herein, it was stated that the merits of the said claim were not discussed in that decision, but that the conclusions therein reached were based wholly upon the fact that the question then at issue “had been decided adversely by the medical referee.” As also before stated herein, the action of the Department at that time was, perhaps, in accordance with precedents established in prior departmental decisions in the consideration of questions of like character. It was stated, however, that the rules laid down in such decisions were neither inviolable nor so absolute as to admit of no departure therefrom. And attention was invited to the fact that the practice in question had since been abrogated. It would be manifestly inconsistent to allow the views of the medical referee to influence the judgment of the Department upon a question raised on appeal as to the propriety of his own action in the premises, as such practice would tend to defeat the very object for which the appeal was taken, namely, to secure an entirely new and independent judgment upon the facts presented for consideration.

The opinion of the medical referee upon which the decision now being reconsidered was based has hereinbefore been fully set out. By reference thereto it will be observed that the only grounds assigned therein for adhering to the action then appealed from was the fact

that the claimant had stated to the examining surgeons that he had had an apoplectic stroke, and that it was, consequently, believed that the paralysis (of left side) was of cerebral origin, and could "not be regarded as a pathological result of spinal irritation." The question as to whether or not an increase in rate was warranted on account of the degree of disability shown to exist separately from and independent of the alleged effects of an apoplectic stroke does not appear to have been even considered, either in the said medical opinion or in the decision based thereon.

At the medical examination made of the claimant October 19, 1896, pursuant to his said claim for increase, in which the adverse action heretofore passed upon by the Department was taken, as above stated, he made the following statement to the examining surgeon:

Spinal trouble began in 1862. My spinal column felt at that time dead, after which I had strange feeling in my entire left side; felt as though it was asleep. Could not stand up straight for two years. About six years ago I had a paralytic stroke; became unconscious at the time, and was two or three months recovering, after which my left side was very much worse. About five years ago this month had second stroke, and was not out of the house for ten months and have never been away from home since. Have lost all control of my bladder. I am wholly disabled, and require a nurse part of the time.

The objective conditions described were as follows:

No evidence of any injury of head. Spinal column exceedingly tender and sensitive to pressure; can not stand any pressure over spine. I also find unilateral paralysis—left side. He can, while standing, swing his left arm slightly, but not without considerable tremor, and can also swing his left leg somewhat, and with the assistance of two canes can manage to get across the house. No sensation whatever in his left side—skin or muscles. It is impossible for him to locate prick of a pin—in fact, he states he does not feel anything. Skin appears dry, cyanotic, hard, cool, and marble-like. No degenerative atrophy in the paralyzed muscles.

Measurements of right and left side about the same; no difference worthy of note.

His memory is failing him. He states the right side of his head above his ear feels full and has a throbbing sensation—pains him very badly at times.

Disease of bladder: Claimant has lost all control of bladder—urine drops from him continually. His clothes to-day show evidence of this fact; hence impossible to make examination of urine. * * *

Claimant is totally and permanently disabled. No evidence of vicious habits or of syphilis.

Claimant's present condition is due, in my opinion, to both cerebral disease and spinal irritation.

There is a consistent history in this case of some nervous affection of this appellant's whole left side—not amounting to paralysis, or, perhaps, even paresis—long prior to the occurrence of the apoplectic strokes, of which he also gives a history, and there seems but little reason to doubt that had the said paralytic strokes never occurred, there would have been no difficulty in establishing the fact that the claimant was utterly unfit for the performance of any manual labor at the date of the medical examination last above referred to. It can not be denied

that such a condition of the arms and hands as was shown to exist in this case prior to the first attack of apoplexy might be caused by a serious lesion in the cervical region of the cord. The mere fact that both arms are involved in any case of this kind tends to locate the cause of the conditions found in the upper portion of the cord instead of in the brain. In this case, however, the fact that one eye, the tongue, and one side of the face, as well as both arms, were more or less affected prior to the occurrence of the first apoplectic attack tends to show the existence of some chronic morbid condition of the brain as well as of the cord, and the subsequent condition of the soldier's mind tends to confirm this view; but the cord lesion is the only one that has been established as of service origin and is, therefore, the only cause of disability to be considered in determining his alleged title to an increase in rate in 1896.

The basic principle upon which claims for straight increase under the general law are adjudicated involves, primarily, the question as to whether or not the degree of disability due to the pensioned cause or causes, per se, has increased to such an extent as to warrant the allowance of a higher rate of pension; and, secondly, the question as to whether or not some sequence of such pensioned cause or causes has arisen which increases the disability and consequently warrants an increase in rate.

In the case at bar the essential feature of this principle appears to have been ignored in the adjudication of the claims for increase filed April 16, 1896, and June 12, 1897, respectively, each of which was rejected principally upon the ground that the paralysis of the claimant's left side could not be regarded as a pathological sequence of the disease of spine, for which he was pensioned.

Chronic diseases of the spinal cord are almost always progressive in character, and it is wholly within the bounds of reason and proper conjecture to suppose that if, as was conceded by the Bureau, the pensioner was disabled in a degree equivalent to the loss of a hand or foot for purposes of manual labor in 1888, by disease of spine, he would, in all probability, be wholly incapacitated for the performance of any manual labor eight years thereafter, or in 1896, as he claims to have been.

It has already been held herein that the degree of disability shown to exist in 1897, irrespective of the effects of the alleged apoplectic attacks of 1889 and 1890, respectively, was such as to wholly and permanently unfit the pensioner for the performance of any kind of manual labor, and the rejection of his claim for increase filed June 12, 1897, was reversed accordingly. In the judgment of the Department, the degree of disability shown to exist in 1896 as a result of disease of spine was, practically, quite as great as that manifested less than one year later. Therefore, the rejection of the claim for increase

filed April 16, 1896, is held to have been error, and is hereby reversed and set aside, as is, also, departmental decision of May 22, 1897, affirming such rejection.

The Bureau will please proceed to the readjudication of the aforesaid claims for increase in accordance with the views herein set forth at as early a date as practicable, as the claim has been made special, for which purpose the papers in the case are remanded herewith.

AID AND ATTENDANCE—RATE—ACTS OF MARCH 3, 1879, AND MARCH 4, 1890.

JACOB S. CLARK.

The act of March 3, 1879, as amendatory of the act of June 17, 1878, confers a statutory right to the \$72 rate upon "all soldiers and sailors who have become totally blind from causes occurring in the service of the United States."

The act of March 4, 1890, provides that such rate shall be paid to "all soldiers, sailors, and marines who * * * become so totally and permanently helpless from injuries received or disease contracted in the service and line of duty as to require the regular personal aid and attendance of another person."

Held: That inasmuch as the facts presented and the evidence adduced in the case at bar not only show that the appellant, who is pensioned at the rate of \$50 per month for "disease of eyes, piles, and disease of heart, result of rheumatism," is, for all practical purposes, totally blind, but that he also both requires and has the regular aid and attendance of another person, by reason of the degree of disability due to such pensioned causes, he is entitled to the \$72 rate under the provisions of each and both of the said acts, from December 13, 1899, the date of the certificate of the first medical examination showing not only entire absence of all useful vision, but total and permanent helplessness as well.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, November 27, 1901.

The appellant in this case, Jacob S. Clark, late corporal, Company M, Seventh Ohio Cavalry, is now pensioned at the rate of \$50 per month for disease of eyes, piles, and disease of heart, result of rheumatism, which rate was allowed from December 13, 1899, the date of a medical examination made of the pensioner in pursuance of his claim for increase filed June 1, 1899, at which time he was pensioned at the rate of \$30 per month (second grade) for said causes of disability.

Inasmuch as the \$50 rate is the rate which the act of July 14, 1892, provides shall be paid to soldiers and sailors who are not only "totally incapacitated for the performance of manual labor by reason of injuries received or disease contracted in the service of the United States and in line of duty," but who also "are thereby disabled to such a degree as to require frequent and periodical, though not regular and constant, personal aid and attendance of another person," the allowance of such rate in this case can only be construed as an acknowledgment on the part of the Bureau that the claimant requires the frequent

and periodical personal aid and attendance of another person by reason of the degree of disability shown to be due to the aforesaid pensioned causes. It had previously been conceded that he was wholly incapacitated for the performance of manual labor by the allowance of the second-grade rate for such pensioned causes from a prior date.

The claimant alleged in his said application for increase that the disease of eyes had so increased in severity that he had become totally blind in both eyes; that he believed the blindness to be permanent; that he requires "the regular and constant aid, care, and attendance of one or more persons;" that he is unable to go from one room to another alone; that he requires assistance in dressing and undressing; that he has to be led to the table, and some one else has to prepare his food on his plate before he can eat it.

As the said claim for increase was based wholly upon the degree of disability alleged to be due to the disease of eyes for which the soldier is pensioned, the objective conditions found as a result of such disease at the medical examination to which he was subjected December 13, 1899, in pursuance of such claim, are the only ones that need be especially referred to at this time. Those conditions were as follows:

There is inflammation of the conjunctiva of both eyes, with a purulent discharge from both. There is opacity of each cornea, so that he is unable to discern light.

This claimant is entirely blind in both eyes, is unable to discern light, and is entitled to \$72 per month for disease of eyes.

Before adjudicating the said claim, however, it was deemed advisable to have the claimant's eyes examined by an expert; and an order for that purpose, under special instructions by the medical referee, was issued April 18, 1900.

The examination was made April 28, 1900, with the following results:

The lids of both eyes, upper and lower, being everted, the conjunctivæ were found thickened and very vascular, with marked cicatricial contraction. Tarsus slightly bent, upper lid more marked in right than left eye. Symblepharon anticus is also present, which is more marked in right eye than left. While there is marked cicatricial contraction, there is no trichiasis, ectropion, or entropion, neither pterygium of either eye. Trachoma very marked, both eyes; cornea of both eyes covered with opacities and pannus; the marks of ulceration of the cornea are very plain, leaving dense opacities. Pupils of both eyes larger than normal and did not respond to light and shade, but responded readily to atropine, showing no synechia, either eye. The enlarged pupils, and the severe pains the applicant claims he has suffered with in the eyes and temples, by times, first one and then the other eye, would indicate attacks of glaucoma; however, the green reflex was absent, which could not be seen if present on account of the cloudiness of the corneas; no abnormal tension was found in either eye at the time of this examination, and as the ophthalmoscope could not be used to ascertain the condition of the fundus of the eyes, it would be very difficult to say whether or not the attacks of pain were due to glaucoma or iritis. The red reflex could not be seen in right eye, but in left eye it showed about one-half on the temple side; otherwise no results were gotten from the ophthalmoscope.

Right eye vision, 0.

Left eye vision, 1/175.

It is noted that one two-hundredth vision in the left eye is reported as having been found at this examination; but upon what hypothesis such alleged degree of vision was demonstrated does not appear. The mere fact that the examining surgeon obtained the "red reflex" from the temporal half of the left eye does not indicate that the soldier had any vision in the left eye, and it certainly could not be taken as a gauge for determining the degree of any existing vision. And it is reported that no other results were obtained by the use of the ophthalmoscope. No evidence of glaucoma or of any other intercurrent or complicating disease of the eyes having been found upon medical examination, it can not properly be assumed that any affection of the eyes other than that for which he is pensioned exists.

It was then deemed advisable to have a special examination held in the premises before taking final action in the claim for increase under consideration, and the papers in the case were, accordingly, sent to the field for that purpose. The depositions of two physicians and of thirteen other witnesses, all of whom were reported to be of good repute, were taken at this examination. The special examiner reported that the evidence submitted by him was the best that could be obtained as to the question at issue, and said that it was, in his opinion, sufficient to establish beyond a doubt the fact that the pensioner is "practically blind, requiring the regular personal aid and attendance of another person."

The claimant, himself, deposed and said, in part:

I can not see; can not make change. I must have a constant attendant to lead me about. My food at the table has to be cut for me, as for a child.

I have been totally blind fifteen months, nearly.

I can not tell when day comes nor when it goes.

Rebecca J. Clark, wife of the appellant, deposed and said in part: That the soldier is blind, and almost as helpless as a child; that he has to be dressed and undressed; that he can not go about alone; that he has to be led to the table, his chair placed for him, and his food cut and placed on a plate before him, when he feeds himself.

Ella B. Clark, the appellant's daughter, deposed and said, in part:

As far as I know, he is totally blind. I know that I have to wait on him, and do things for him that he could do for himself if he could see the least bit.

I pour his coffee, prepare his food, help him to dress, and, in fact, wait on him as I would on a baby. I would rather care for a baby that could see. He can go nowhere alone, and can not distinguish light from darkness.

Stephen D. Neal, a friend and neighbor of the appellant, deposed and said:

I have known the claimant ever since my boyhood, and have always lived within one-half mile of him.

He has had bad eyes ever since the war. He has been totally blind for fifteen months. I have seen him dozens of times, and been at his house often during that time.

I judge that he is totally blind from his appearance and acts. He gropes about, using his cane to feel his way; I mean about the house and in his dooryard. I have never dined with him; have seen him at the table, though, and his family would have to put his food on his plate for him, and find his chair for him.

I have seen him away from home, but always with an attendant. I don't think he can see a particle of light. I know of no reason for a different opinion.

If he could see the least he would make it known, as he could not stand it to be confined to the limits of a room and his dooryard, as he likes to stir about so well.

I am not related nor interested.

Ten other witnesses, all of whom, as heretofore stated, are of good repute, testify substantially to the same facts set out in the foregoing deposition.

Dr. Eli G. Alcorn, the official expert of the Bureau by whom the claimant was examined April 28, 1900, and whose findings are set out above, deposed and said, on July 8, 1900, as follows:

I am well acquainted with the pensioner, and now have him under treatment for disease of eyes.

He is practically blind in both eyes. The left eye is sightless and he can not count his fingers. He says he can not see light, but he can, but his vision is such that he can not see any object.

He must have regular aid and attendance to go about at all.

Question (by Special Examiner). What results do you anticipate from your treatment?

Answer. Simply to relieve the severe inflammation of the cornea and iris, thereby relieving the ciliary neuralgic pains.

Dr. Salathiel W. Williams, deposed and said:

I have known the claimant some twelve or fifteen years. His eyes have been weak most of the time. He is now totally blind. There is no doubt in my mind as to this. I saw him about one week after he was stricken, and I thought he had an attack of iritis in one eye, and that the condition of the other was sympathetic. I saw him the last time about one week ago and made a casual examination of his eyes, and I found him to be blind. I had seen him occasionally before that, and had treated his eyes for several months after he was stricken, and all the time since he has been helpless so far as his vision is concerned. And he has and does require regular aid and attendance.

For anything that I know, his present eye trouble is due to the former condition, and that the former condition was the cause or factor in producing his present blindness.

Subsequent to the rejection of the claim for increase herein considered, some additional medical evidence has been filed in which it is stated that—upon examination of the claimant's eyes—it was found that he was totally and permanently blind, requiring the regular personal aid and attendance of another person. This evidence, however, not having been considered by the Bureau in connection with its adverse action in the premises, has not been permitted to influence the judgment of the Department as to the validity of the appellant's contentions. Although the said evidence is corroborative of much that has been set out above, it is, nevertheless, more cumulative than important, as there is an abundance of evidence without it upon which to reach a satisfactory conclusion as to the justice of such contentions.

In addition to the degree of disability due to the condition of the appellant's eyes, as above recited, it is shown by the certificates of examination and evidence that he is suffering from a very serious organic disease of heart, which, it is claimed, is liable to cause his death at any time. Sitting, the pulse was 100; standing, 120; on slight exertion, 140; irregular and intermitting; marked feebleness of radial pulse. There was also said to be constant and painful sensation of the pulsations of the heart, severe and distressing syncope, and dyspnoea on slight exertion. And his rectum is described as being congested, with a bunch of piles protruding, half as large as a hen's egg, ulcerated and discharging. As heretofore stated, he is pensioned for both disease of heart and piles, as well as for disease of eyes.

That this appellant is "so totally and permanently helpless from * * * disease contracted in the service and line of duty as to require the regular personal aid and attendance of another person," and that he is, consequently, as is provided by the act of March 4, 1890, "entitled to receive a pension at the rate of seventy-two dollars per month"—from December 13, 1899, "the date of the certificate of * * * the board of surgeons showing such degree of disability—" is, in the judgment of the Department, shown beyond the question of a doubt. And that he is, and has been since the date of the certificate of such examination, for all practical purposes, totally and permanently blind is, it is thought, equally well established.

The only point in the case about which there seems to be any doubt whatever is the question, Has the appellant any perception of light in either eye? He says, himself, that he has not; but he is contradicted upon this point by Dr. Alcorn, who, as hereinbefore shown, testified that he could distinguish light, but that he "can not see any object," and that "he is practically blind." However, the question as to whether the appellant can or can not distinguish daylight from darkness is scarcely a vital point in the case. A man who might be sensible of the fact that the rays of a bright light were thrown upon his eyes and yet be unable to distinguish any object whatever can not be said to have even the slightest degree of useful vision, and must be regarded as being, for all practical purposes, wholly blind. As far as the sense of vision is concerned he would be as helpless as a man with total atrophy of both optic nerves or one who had had both eyeballs enucleated.

Dr. Alcorn, whose testimony has just been referred to, was, as heretofore pointed out, the official expert by whom the claimant was last examined. It is deemed important to note that although this examiner stated in his certificate of such examination, dated April 28, 1900, that the claimant had one two-hundredth vision in his left eye, he stated in his deposition before a special examiner less than three months later that "the left eye is sightless."

It is also important to note that while in his said certificate of examination Dr. Alcorn stated that the severe pains the applicant claims he has suffered from in the eyes and temples would indicate attacks of glaucoma, although no physical signs of such disease could be discovered, he said in his aforesaid deposition that his treatment of the appellant's eyes was directed to the relief of the severe inflammation of the cornea and iris of each eye, "thereby relieving the ciliary neuralgic pains."

The lack of harmony in the foregoing statements is quite evident, and is not explained.

In view of the facts presented and the evidence adduced in the premises, it is not apparent by what process of reasoning the Bureau reached the conclusion that the claimant required "the frequent and periodical, though not regular and constant, personal aid and attendance of another person," and consequently adjudicated the claim for increase herein considered under the provisions of the act of July 14, 1892, instead of under those of the act of March 4, 1890.

If the provisions of the act of March 3, 1879, were taken into consideration at all when such claim was adjudicated, it would seem as though the Bureau thought that the claimant had some degree of useful vision.

The act of June 17, 1878, provided that all soldiers and sailors who had lost the sight of both eyes in the service of the United States should receive, in lieu of the pension then paid to them, the sum of \$72 per month.

The act of March 3, 1879, as amendatory of the act of June 17, 1878, provides that the said act shall be so construed as to include all soldiers and sailors who have become totally blind from causes occurring in the service of the United States.

That loss of sight of both eyes and total blindness are, within the meaning of these statutes, identical can not, it is thought, be disputed.

Sight is defined by Gould as—

That sense by which the image of an object projected upon the retina is conveyed to the mind.

Accepting this definition of sight as the correct one, if no image of any object whatever is "conveyed to the mind" by being "projected upon the retina" is there not total loss of sight or total blindness? One witness out of the many that have testified in this case has stated that the appellant had some perception of light, but even he states that the latter is "practically blind." Light, however, can hardly be looked upon as an "object," but should be regarded as the medium by which images of something more material are "projected upon the retina," and thence conveyed to or appreciated by the mind. A person with perfectly normal vision could go into the sunlight, turn his face toward the sun and close his eyelids tightly, yet still appreciate

or recognize the fact that the sun was shining brightly, but no image of any object placed or coming between his eyes and the sun would be projected upon the retina nor conveyed to the mind, and the sense of sight would be absent so long as the eyes remained closed. Opacities of the cornea, such as shown in this case, would have the same effect as closure of the eyelids.

That it was the intent of Congress to grant a pension of \$72 per month to a soldier or sailor who was so absolutely blind as to be incapable of distinguishing between daylight and darkness, and to deny such rate of pension to a soldier or sailor who still retained some perception of light but was otherwise equally blind or helpless, so far as the sense of vision is concerned, is, in the judgment of the Department, not the proper construction to be placed upon existing laws relative to this class of cases.

It has not been shown as a matter of fact, however, that the appellant in this case has any sense whatever of what may properly be termed sight. He says, himself, that he can see nothing, and every witness that has testified in the case sustains him in this respect, with one exception, and this one, Dr. Alcorn, practically contradicted himself when he deposed and said: "The left eye is sightless," he having previously certified, as an examining surgeon, that the claimant had one two-hundredth vision in that eye. The established conditions, then, which confront us in the premises can not be permitted to be outweighed by a mere theory that has not been shown to have any foundation in fact.

In view of the facts herein set out, the Department feels impelled to hold that this case comes within the purview of the provisions of the act of March 3, 1879, and that the appellant has, consequently, a statutory right to the \$72 rate for disease of eyes and resulting total blindness.

That he also has a clear title to such rate under the provisions of the act of March 4, 1890, is, it is thought, shown beyond the shadow of a doubt. The evidence upon this point is so clear and convincing that there is, in the judgment of the Department, no question as to the fact the appellant absolutely requires, as well as has, the regular personal aid and attendance of another person—by reason of his aforesaid inability to see any object whatever.

The action appealed from is therefore hereby reversed, and the papers in the case are herewith remanded for proper action looking to the prompt readjudication of the appellant's aforesaid claim for increase in accordance with the views herein enunciated.

AID AND ATTENDANCE—RATE.

LABAN W. McINTURFF.

The aid and attendance that appellant requires in putting on a coat or shirt, or in being taken home occasionally when exhausted, is not such as was contemplated by the acts of July 18, 1874, June 16, 1880, March 4, 1890, or July 14, 1892, providing rates of pension in excess of \$30 per month.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, November 27, 1901.

Laban W. McInturff, late of Company B, Third North Carolina Mounted Infantry, is a pensioner at \$30 per month (second grade) on account of hemorrhoids or anal fistula, rheumatism, and resulting disease of heart, disease of liver, dyspepsia, and incomplete right inguinal hernia. He filed a claim for increase May 31, 1900, alleging resulting prostration and loss of sight of right eye from pain of rheumatism and the need of constant aid and attendance of another person. This claim was rejected March 11, 1901, on the ground that the alleged increase of disability was not shown and alleged results were not accepted as such. From this action appeal was taken April 1, 1901, it being insisted that the evidence on file fairly establishes title to increase.

The medical referee gave an adverse opinion in a report on this appeal, holding that the descriptions of claimant's disabilities did not warrant the conclusion that he required aid and attendance of another person, either regularly and constantly or frequently and periodically; that his condition was not materially worse than it was in 1898, when the Department affirmed the rejection of a former claim for increase.

In a review of the evidence it was found that while the statement of the medical referee was substantially true, yet the medical evidence and certificate of examination in the last claim gave somewhat more particular descriptions of the several disabilities and indicated an aggravation of symptoms which might cause the claimant to need the help of others in his daily life and entitle him to the rating of \$50 per month, under the act of July 14, 1892. This was gathered mainly from the statement in the certificate of medical examination of February 13, 1901, as follows:

On account of rheumatism, disease of heart, hernia, and anal fistula, this man requires the frequent and periodical aid and attendance of another person to dress and undress and feed himself, also to attend to the calls of nature. He can walk about a part of the time with the aid of a staff.

This evidence was not altogether satisfactory, but because of the indications mentioned it was deemed advisable to refer the case for special examination to ascertain whether, as a matter of fact, claimant had had the aid and attendance of another person and whether the same was actually necessary.

The special examination was held in August, 1901, and as a result

the claim was again rejected on September 4, 1901, on the ground that the disabilities for which claimant is pensioned did not warrant the increase claimed, his condition being due in part to other disabilities. A new appeal from this action has been filed, October 9, 1901.

In the special examination the testimony of the claimant, his wife and son, one or two physicians, and one or two neighbors was taken. The claimant's statement is to this effect:

The sight of my right eye is gone. I am unable to see anything with my right eye. I had a very bad attack of rheumatism and heart trouble and dyspepsia, commencing in January, 1900. It lasted about ten weeks. I was confined to the bed and had one spell of about thirty-six hours, when I was in such misery, on account of pain all over me, that I was unconscious. The pain finally settled in my head and right eye. The sight of the right eye seemed to fail me until April, 1900, when it left me entirely, and I have not been able to see any out of that eye since. I candidly believe that rheumatism caused it.

My pensioned disabilities have increased in severity until I am not able to wait on myself half of the time. I require aid and attendance all the time when I am confined to the house and bed on account of sick spells. Sometimes when I come down town I have to have assistance to enable me to get back home, and often I am unable to walk the distance from my house down town without having to sit down and rest. I have been sent to my house very often in the delivery wagons of the merchants. I will come down town, give out, and be unable to walk back home, and will be sent home. In the spell of sickness that I had, lasting eight to ten weeks from January, 1900, some one had to be with me and wait on me all the time. John B. Jones waited on me during that spell for about six weeks. He assisted in dressing and undressing me. My son, James McInturff, visited me often and assisted to wait on me in dressing and undressing. My wife and daughter often assisted me up and down stairs.

I had another attack in January, 1901, that lasted me until April. During that spell of sickness I was waited on by the members of my immediate family and by my son James, but no outside persons, for I was not able to hire them. All of that time, from and including January until along in April, I was confined to the house and one-half or two-thirds of the time confined to the bed. The cause of my sickness was dyspepsia and rheumatism. After this spell I got so that I could go around. I suffered a relapse while down town and had to be hauled home, and I was confined to the house or bed for about four or five weeks. That relapse came on me about the 1st of May. I have not had a spell since. I have been coming down town now without conveyance about twenty or twenty-five days. Sometimes I can come down town and return home alone, and sometimes I have to be carried home in a conveyance.

When I am down sick, as I was in January, 1900, and January and May, 1901, some person has to be with me all the time to wait on me, assist about changing my clothes, bring my victuals, etc. Since I became able to go around, I require the presence of some other person to aid me when I put my clothes on. I can usually attend to the calls of nature unaided. I can manage to slip my clothes off when I retire at night, and I can sometimes arrange my clothes when I get up in the morning, but it is impossible for me to put on an undershirt unaided. Neither can I put on my coat without some one to help me, for the reason I am unable to get my hand above my head. I am unable to extend my hand back sufficiently to enable me to place my hand in the sleeve and draw the coat upon my shoulders. I can put on other garments, as pants, shoes and socks, and tie my shoes unaided. I have not been able to put on my overcoat without assistance for about eight years. The reason that I

am unable to put on my coat or shirt unaided is on account of rheumatism in my shoulders, which prevents me from raising my arms above my head. I am unable to show, by any person outside of my immediate family, that I require help when dressing.

This statement of the claimant as to the aid and attendance needed during his spells of sickness, and the assistance required in putting on his coat and shirt is corroborated, as before stated, by the testimony of claimant's wife and son. The only other assistance he requires appears to be in going up and down stairs at times, and being conveyed home when he has become exhausted while down town. The physicians and neighbors do not testify to any more than this, their statements only detailing the facts as to such assistance being rendered on a few occasions within their observation. Whether these things constitute such aid and attendance as is contemplated by the statute is extremely doubtful. In the first place it may be remarked regarding the two spells of sickness, one early in 1900 and the other in the first part of 1901, that they are hardly to be considered factors in the condition which would give title in a claim of this kind. During the continuance of these sicknesses pensioner doubtless required and received almost constant aid and attendance, but the spells of sickness were of only a few weeks' duration and were separated by a long interval. The same need of attention might exist in the case of one who has far less permanent disabilities, and who ordinarily would not be totally disabled for manual labor. Even a man of uniformly good health is liable to attacks of sickness which confine him to the house and bed for weeks at a time.

As for the permanent and continuing need of help in this case, growing out of the disabilities for which pension has been allowed, there does not appear to be any except in so far as the rheumatism of the arms and shoulders prevent the free movement thereof, and this only to the extent of preventing him from putting on his coat or shirt. There is no special reference to the other disabilities as interfering with the daily functions of life. The mere matter of assistance in putting on a coat or shirt is not believed to be such condition as was contemplated by the statute in providing the higher rate of pension. As for the help which pensioner requires and receives by reason of his going away from home and at times becoming exhausted so that he has to be conveyed home, it may be stated this is hardly a situation for which the law intended to provide. It would seem to be altogether optional with the pensioner whether he leaves home or not, and knowing that he is liable to become prostrated by overexertion, he does so at his own risk. Besides, it is not clear that this condition of need grows out of the disabilities for which he is pensioned, but, having other disabilities and being 69 years of age, it is more than likely that these latter contribute largely to the periods of exhaustion.

There is a further point to be noted in the case, which must have

some influence in the determination of the issue. Even if it was absolutely necessary for the pensioner to go away from home, and occasionally to be conveyed back in a vehicle, and if the helping with his coat and shirt could be regarded as personal aid and attendance, still these are simple offices which of themselves would hardly call for remuneration of any one performing them. The statute clearly contemplates a condition wherein the aid and attendance rendered would not only be necessary but would be a tax upon the financial resources of the pensioner. Hence the provision of the large sums for the first and the intermediate grades of pension.

Taking into consideration the descriptions of the disabilities for which pension has been allowed and the actual extent to which these contribute in the help the pensioner needs and receives it is not believed that the intent of the law has been met in his case. He is not entitled to either the \$50 or \$72 per month rating. The rejection of the claim is accordingly affirmed.

DESERTION—MINORS—MILITARY AGE—VOIDABLE ENLISTMENT.

FRANCIS M. SAMUELS, ALIAS CHARLES SMITH.

Claimant having enlisted when he was over 18 years of age in 1861, and deserted from said service, and subsequently reenlisted, has no title to pension under the act in question.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
November 30, 1901.*

Francis M. Samuels, alias Charles Smith, formerly sergeant Company F, Eleventh Indiana Volunteer Cavalry, filed a claim for pension under the act of June 27, 1890, alleging rheumatism in legs and feet, heart disease, lung trouble, and chills and fever. This claim was rejected July 30, 1898, on the following stated grounds:

No title under the act of June 27, 1890, by reason of desertion, as shown by the records of the War Department.

July 5, 1899, the claimant filed an appeal to the Department alleging that he never intended to desert from his first service, also making the following contention:

That even allowing the record of the first service to be true (which we deny) we claim the benefit of a decision in the claim for pension of Jasper M. Stine, Company M, Sixteenth Illinois Cavalry, relating to the pensionable status of minors who deserted from the service, in which decision it is held, as Jasper M. Stine was a minor, although he deserted his first service, yet he was pensionable for his second service. Hence, under this ruling, we claim that Francis M. Samuels is entitled to pension, as the record of his enlistment paper will show he was born April 5, 1842, hence was a minor.

The issue raised by this appeal, it will be noted, is the question of claimant's minority at the date of his first enlistment.

The record discloses that this claimant first filed a claim under the act of June 27, 1890, which was rejected May 26, 1896, on the same ground as stated above. Appeal was taken to the Department, and on October 10, 1896, an opinion was rendered, affirming the action of the Bureau, in which it was held:

The records of the War Department showing that this appellant deserted from his first term of enlistment for service in the war of the rebellion, and has never been honorably discharged therefrom, and that the War Department declines to remove said charge and grant him an honorable discharge, he has no title to pension under any existing law on account of disability incurred in said war or service performed therein. Lessor's appeal, decided March 30, 1896, No. 55, advance sheets, vol. 8, P. D.

A motion for reconsideration was filed, and on November 20, 1897, the Department denied said motion, and, in the course of the opinion, cited the following cases in support of the decision that claimant had no pensionable status under the law:

Joseph C. Williams (7 P. D., 218); Isaac W. Babb, alias John Dunlap (8 P. D., 59); Syprian Archambault (6 P. D., 240); George Lessor (8 P. D., 114).

Said opinion concluded as follows:

The facts relative to claimant's desertion should be presented to the War Department on an application to remove the charge of desertion; for, until this charge is removed from the record of that Department, claimant has no title to pension.

It is to be observed that the claim is precisely in the same condition as when it was adversely determined by the Department in the two opinions above noted, except that the claimant now raises the point that he was a minor when he enlisted in 1861, and therefore his desertion from the first service was not such a desertion as would bar him from pension on account of a second service, and cites the case of Jasper M. Stine (9 P. D., 488), in support thereof.

In that case the following language is used:

Enlistment is, essentially, a contract (Winthrop on Military Law, vol. 1, p. 773), and the general rule is that a minor is not bound by his contract unless the same is manifestly beneficial to him. But, like marriage, enlistment is a contract *sui generis*, the rules which apply to contracts in general being, with respect to it, modified by considerations of expediency or public policy. It is necessary for the general good that the Government should be able to command the services of all its citizens, of whatever age, whenever the exigencies of the country require it, and this necessity overrides the usual rights of individuals. Hence it is held that Congress may constitutionally authorize the enlistment into the military service of the United States of any minors, either with or without the consent of their parents or guardians. (Story, J., in *United States v. Bainbridge*, 1 Mason, 81; in the matter of Riley, 1 Benedict, 410; in the matter of Beswick, 25 How. Pr., 151.)

And Congress has, by appropriate legislation, exercised its constitutional rights in this regard. (See acts of April 30, 1790; March 3, 1795; March 16, 1802; January 11, 1812; January 20, 1813; January 29, 1813; December 10, 1814; February 13, 1862;

and July 4, 1864.) In all these statutes, except the last, the minimum age for enlistment is fixed at 18 years; in the last, enlistments (with the consent of parents or guardians) of persons as young as 16 are legalized. No act has ever been passed authorizing the enlistment in the Army of persons under the age of 16 years. By section 1118 of the Revised Statutes the enlistment of such persons is expressly prohibited.

According to the facts in the case under consideration the claimant was 19 years of age at the date of his first enlistment. At that age Congress declared him of lawful age for enlistment into the military service of the United States. It is clear the Stine case (*supra*) is not in point with claimant's case. Stine was under 16 years of age when he enlisted, and his contract of enlistment was void, or at least voidable. But waiving any question that might be raised because of dictum expressed in the Stine case (*supra*), it is only necessary to refer to the case of Aura Hetherington (10 P. D., 355), where the facts are substantially as they are in the case under consideration, and where the Stine case (*supra*) was discussed. In that case it was held:

I am therefore of the opinion that a minor 18 years of age could enter into a valid contract of enlistment in the United States regular or volunteer service in 1861, and that prior to the act of May 15, 1872, such enlistment was valid without the written consent of parent or guardian; that soldier's first enlistment and his desertion therefrom bars his widow from receiving a pension under the act of June 27, 1890.

The first condition of her title to pension under said act is that her husband shall have served ninety days or more in the Army or Navy of the United States during the late war of the rebellion and been honorably discharged, and it has been uniformly held by this Department that soldier must have been honorably discharged from the service contracted to be performed during the war of the rebellion to entitle him or his widow to a pension under said act. See instructions to Commissioner of Pensions by Assistant Secretary Bussey (4 P. D., 225); Susan Colgin (5 P. D., 127); James Cullen (6 P. D., 72); Kate Eibel (7 P. D., 179); Mary E. Walker (*Ibid*, 197); Elizabeth J. Halfhill (8 P. D., 467); Bessie C. Wheeler (9 P. D., 155); Susan Williams (10 P. D., 92), and De Witt C. Nash (*Ibid*, 141).

In the case of Stephen F. Monthony (11 P. D., 193) the Department held:

In 1861 the enlistment of a minor under the age of 18 years was voidable, and a repudiation of such enlistment on the part of the minor by the act of desertion would constitute no bar to pension on account of a disability incurred during the period of the second enlistment.

In the case of Edward E. Napier (11 P. D., 240) it was held:

This claimant being over 18, but under 21, years of age at the date of his enlistment in June, 1861, such enlistment was valid and binding upon him; and any disability incurred by him during the term of such enlistment, but after his desertion therefrom and while serving in the United States Navy, was not contracted in line of duty.

Under these decisions the claimant's first enlistment was a valid enlistment, and his desertion therefrom is a bar to his claim under the act of June 27, 1890. As has been stated in former departmental opinions, the only relief for this claimant is in the War Department. So

long as he is borne on the rolls there as a deserter he has no pensionable status.

— This action of the Bureau is affirmed.

MINORS—WIDOWS—REMARRIAGE—ACT OF MARCH 3, 1865.

RHODA E. TUTEN (WIDOW).

Section 4 of the act of March 3, 1865, placed title in the minors, to the exclusion of the widow, provided the widow remarried without payment to her of any part of the pension; and said section was not repealed or modified, so far as such issue is concerned, by any act prior to March 30, 1868, the date on which the claim of the widow herein was rejected.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
November 30, 1901.*

Rhoda E., as widow of Wiley Tuten, formerly private in Company A, Fifth Tennessee Volunteer Infantry, filed her application under the general law on July 15, 1865, claim being rejected on September 24, 1891, on the ground that the pension having been paid to the minor children, claimant was without title. An appeal was filed on June 24, 1899.

The facts in the case are as follows: Soldier enlisted on February 25, 1862; died in the service on April 2, 1863; the widow filed her application on July 15, 1865, and she remarried on November 10, 1867, her claim for pension not having been adjudicated. The guardian of the minors executed a declaration in behalf of the said minors on December 2, 1867, the date of filing not being of record, and pension was paid on behalf of said minors from the date of the father's death up to the date of their pensionable majority under action of April 8, 1868.

The issue in this case is wholly one of law, and must be governed by the laws in force at the time.

Section 2 of the act of July 14, 1862, is as follows:

That if any officer or other person named in the first section of this act has died since the 4th day of March, 1861, or shall hereafter die, by reason of any wound received or disease contracted while in the service of the United States and in the line of duty, his widow, or if there be no widow, his child or children under 16 years of age, shall be entitled to receive the same pension as the husband or father would have been entitled to had he been totally disabled, to commence from the death of the husband or father, and to continue to the widow during her widowhood or to the child or children until they severally attain to the age of 16 years, and no longer.

The seventh section of the act of July 4, 1864 (13 Stat. L., 388), is as follows:

That on the remarriage of any widow receiving a pension such pension shall terminate and shall not be renewed should she again become a widow.

Section 4 of the act of March 3, 1865 (13 Stat. L., 499), being an

act entitled "An act supplementary to the several acts relating to pensions," is as follows:

That if any officer or other person named in the first section of an act entitled "An act to grant pensions," approved July 14, 1862, has died since the 4th day of March, 1861, or shall hereafter die by reason of any wounds received or disease contracted while in the service of the United States and in the line of duty, his widow, or if there be no widow, or in case of her death or marriage without payment to her of any part of the pension hereinafter mentioned, his child or children under 16 years of age shall be entitled to receive the same pension as the husband or father would have been entitled to under said act had he been totally disabled, to commence from the death of the husband or father and to continue to the widow during her widowhood or to the child or children until they severally attain to the age of 16 years, and no longer: *Provided*, That when such pension has been or shall hereafter be paid to the widow such child or children shall only be entitled to receive the pension to commence from the death or marriage of such widow and [to] continue as aforesaid: *Provided further*, That nothing herein contained shall be construed to repeal or modify the tenth section of an act entitled "An act supplementary to 'An act to grant pensions,' approved July 14, 1862," approved July 4, 1864, and said section is hereby required to be in full force and effect in all cases arising under this act to which said section is applicable, saving and excepting such cases as are embraced in the preceding provisos.

It is noted that the brief face in the case under consideration recites that the claimant's application was filed on May 15, 1867, but a careful inspection of the papers shows that her original application was filed on July 15, 1865, and that the document filed on May 15, 1867, was but a supplemental affidavit. July 15, 1865, will then be considered as the date on which her original application was filed, and the laws hereinbefore quoted are the only ones which would have any bearing upon the issue at date of filing.

It is beyond controversy that section 2 of the act of July 14, 1862, when taken by itself, would give this claimant a title to pension, said pension to commence from the death of her husband and to continue to her during her widowhood. The seventh section of the act of July 4, 1864, has no immediate bearing upon the issue, but is valuable only in this discussion as showing that if the soldier left a widow she would be entitled to a pension, her title to fall when she remarried.

Section 4 of the act of March 3, 1865, appears to provide for another contingency, viz, that of the disposition of the pension in case of the death or remarriage of the widow without payment to her of any part of the pension to which she might have been entitled prior to her death or remarriage. As to this, the act states in express terms:

In case of her death or marriage without payment to her of any part of the pension hereafter mentioned, his child or children under 16 years of age shall be entitled to receive the same pension as the husband or father would have been entitled to under said act had he been totally disabled, to commence from the death of the husband or father.

The effect of this act seems to be plain and unequivocal in that if the widow remarries without payment to her of any part of the pension

to which she might be entitled, then, if there are children under 16 years of age, such children would be entitled to the pension to the exclusion, absolute, of the widow. There appears to be no escape from this conclusion, and while the claimant had title when she filed her application on July 15, 1865, yet if she remarried prior to the payment of any part of the pension to which she had title, then her title fails and the pension must go to the children.

The within widow's claim appears to have been summarily disposed of on March 30, 1868, the records showing "Mar. 30-'68—Rejected—Remarried. Letter to attorney." Prior to such action, however, the act of July 25, 1866 (14 Stat. L., 231), was approved, the sixth section thereof being as follows:

That nothing in the fourth section of an act entitled "An act supplementary to the several acts relating to pensions," approved March 30, 1865, or in any other supplementary or amendatory act relating to pensions, shall be so construed as to impair the right of a widow whose claim for a pension was pending at the date of her remarriage to the pension to which she would otherwise be entitled had her deceased husband left no minor child or children under the age of 16 years.

While at first blush this section last quoted might seem to give the widow a pension after her remarriage, provided her claim was pending therefor at the date of her remarriage, yet a careful analysis of the language of the section in question appears to plainly demonstrate that the right of the widow to the pension, which was pending at the date of her remarriage, is confined wholly to the right which she might exercise, provided there were no minor children left by the soldier. A careful reading of section 6 of the act of July 25, 1866, in connection with section 4 of the act of March 3, 1865, leads the Department to conclude that the act of March 3, 1865, placed the title in the minors, provided the widow remarried prior to the payment to her of any part of the pension to which she might have been entitled, and that the act of July 25, 1866, does not limit such minors' rights, but simply provides that if there are no minor children, then the widow may take up to the date of her remarriage.

There having been no further legislation upon the issue in question until July 27, 1868, and the minors having filed a declaration presumably prior to July 27, 1868, said declaration having been executed on December 2, 1867, the conclusion appears to be unavoidable that this claimant's title passed to the minor children upon her remarriage by virtue of the act of March 3, 1865.

That the rights of a widow who remarries were somewhat obscure and not wholly defined by law is evidenced by the fact that on July 27, 1868, an act was approved (15 Stat. L., 237), section 10 of said act being as follows:

That the remarriage of any widow or dependent mother, otherwise entitled to a pension prior to the application therefor, or to the issue of pension certificate to her, shall not debar her right to a pension for the period elapsing from the death of her

husband or son, on account of whose service and death she may claim a pension to her remarriage: *Provided, however,* That nothing in this section shall be construed to repeal or modify the fourth section of an act entitled "An act supplementary to the several acts granting pension," approved March 3, 1865.

This section provided, first, that the filing of an application by a widow prior to her remarriage was not necessary in order to perpetuate her right, and, second, the provision shows clearly that it was the intent of Congress that the rights granted in the act of March 3, 1865, should remain inviolate. No other legislation upon the point at issue appears to have been had up to the date of the revision of the pension laws, which took place under an act approved on March 3, 1872. The last section quoted is inserted herein in order that it may be seen that it appeared to be the intent of Congress, not only by the act of July 25, 1866, but by the act of July 27, 1868, that the minors' rights, described in the act of March 3, 1865, should remain as granted in the last-mentioned act.

The issue raised by the appeal in the case at bar appears to have been first raised in this Department in the case of Catharine Jones, widow (7 L. B. P., 284). In the opinion in this case Secretary Cox held, on April 19, 1870, that a widow's remarriage while her pension claim was pending barred her title, provided there were minor children. The issue was again before the Department in the case of the widow of John Bois Claise (1 P. D., o. s., 13), dated November 15, 1872. In the opinion accompanying this case Acting Secretary Cowen held that the act of July 25, 1866, and the act of July 27, 1868, enlarged the widow's right to the extent that, notwithstanding the fact there were minor children, the widow would take up to the date of her remarriage. The decisions are silent from the date of the last-mentioned one up to September 10, 1880, when Acting Secretary Bell, in the opinion in the case of Martha Watson (7 P. D., o. s., 212), held that the act of March 3, 1865, placed title in the minors if the widow remarried before payment to her of any part of the pension, and that the acts of July 25, 1866, and July 27, 1868, did not alter the minors' right as described in the act of March 3, 1865.

The facts in the case of Martha Watson were identical, or rather equivalent, to the ones in the case at bar, and the fallacy of the ruling made by Acting Secretary Cowen is plainly apparent, for the reason that he totally ignored the fact that the act of July 25, 1866, did not pretend in any manner to impair the rights bestowed upon the minors in the act of March 3, 1865, but simply gave the widow a right to pension, notwithstanding the fact that she had remarried, if her claim was pending at the date of her remarriage, provided that there were no minor children; and further, he did not take into consideration the proviso in the act of July 27, 1868, which proviso distinctly stated that the said act did not repeal or modify the fourth section of the act of March 3, 1865.

The issue in the case at bar came up collaterally before Assistant Secretary Bussey in the cases of the widow of William S. Colderan (4 P. D., 418) and the widow of Perry Jackson (6 P. D., 230), and while, as stated, the issue was but collateral, yet the trend of the decisions in the last two cases is to the effect that the act of March 3, 1865, placed the title in the minors, provided the widow died or remarried prior to the payment to her of any part of the pension.

It is held that on the date of the rejection of the within-named widow's claim, viz, on March 30, 1868, the law then in force cut off her title to any pension under her then pending claim, and that the action of the Government in paying the pension to the minors was in accordance with law. It logically follows that the rejection of this widow's claim on December 24, 1891, should be sustained.

Action affirmed.

INCREASE-DISABILITY-RATE-DEFECTIVE VISION.

WILLIAM MOORE.

Appellant is adequately pensioned at third grade for the degree of disability shown to result from the loss of left eye, affecting sight of right eye, from gunshot wound, it appearing that he has one-tenth vision remaining in right eye, which would enable him to perform some coarse manual labor not requiring much acuity of vision, and not, therefore, incapacitating for all manual labor, entitling him to the second grade rate.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
November 30, 1901.*

The appellant in this case, William Moore, late second lieutenant Company C, Seventh Iowa Infantry, is now pensioned at the rate of \$24 per month (third grade) for loss of left eye, affecting sight, from gunshot wound.

In an application for increase, filed January 17, 1898, the pensioner alleged that loss of sight of right eye incapacitates him for the performance of manual labor or any kind of labor by which he can earn a support for himself, and that he "can not, without great pain, read for any length of time." He also said that he was suffering from loss of hearing of left ear, but failed to allege any specific cause thereof.

Pursuant to his said claim for increase, the pensioner's eyes were examined by an expert (oculist), October 28, 1898. According to the report of that examination the following objective conditions were found:

Left eye: Anterior portion gone and upper lid adhered to the stump; there is profuse lacrymation. A part of orbit furnished by malar bone is gone. Outer end of lids grown together, making palpebral fissure short and narrow.

Right eye: All appendages normal; conjunctiva normal; cornea normal; pupil

about 3 mm., but a little sluggish and dilates a little unevenly with cocaine. Eye somewhat sensitive to light. Optic nerve partly atrophic; disk borders indistinct; vessels slightly narrowed; retina appears slightly oedematous, but normal.

Right eye: Vision, 12/200 with 2.50- 20/200.

Loss of one eye.

Loss of 9/10 vision of other eye.

The claim was rejected October 13, 1899, and an appeal from that action was filed November 4, 1899. The appellant contends that he is "not able to perform any manual labor on account of blindness and deafness."

The deafness complained of, the appellant says, is in his left ear, and was, he now states, caused by the same wound which destroyed his left eye. He has, however, never filed any formal application for pension on account of deafness as of service origin. Therefore, if he desires to prosecute any such claim he should file the same with the Commissioner of Pensions, who will advise him as to what further steps it may be necessary for him to take in the premises.

Relative to the question as to whether or not the soldier should be considered as wholly incapacitated for the performance of manual labor by reason of the "loss of one eye and loss of nine-tenths vision of the other eye," as was reported to be the conditions existing at the date of the aforesaid medical examination, the Department is of the opinion that while this amount of damage to vision would entirely destroy the earning capacity of one engaged in the trades requiring a high degree of visual acuity, it would not wholly disqualify one from doing a certain amount of coarse work, such as that of a farmer or day-laborer, or engaging, to some extent, in the trades requiring only the lower degree of visual acuity. And inasmuch as ability to perform "manual labor," and not ability to engage in the higher professions or trades, has been fixed by law as the standard by which the amount of damage to the earning capacity of a pensioner, or claimant for pension, is to be gauged, and consequently the rate of pension (when nonspecific) to which he may be entitled for the degree of disability from which he is found to be suffering be determined, it must be held that this appellant is not entitled to the rate fixed by law for total incapacity to perform manual labor (\$30 per month—second grade).

That the ability of this soldier to earn a living by manual labor is very seriously damaged by his low degree of vision is not questioned, and this fact has been recognized by the allowance of the third-grade rate (\$24 per month) in his case; but, as above stated, it having been shown that he is still capable of performing a certain amount of work not requiring much acuity of vision, he can not be regarded as wholly disqualified for manual labor. The action appealed from is, therefore, hereby affirmed.

DEATH CAUSE—DISEASE OF HEART—EVIDENCE—RHEUMATISM

MARY D. RAMSEY (WIDOW).

A physician testified that he had a clear recollection of treating appellant for rheumatism when at home on a furlough in 1863. One neighbor testified it was his understanding, from what the family said when soldier was home on furlough, that he had camp dysentery for one thing, and rheumatism for another. Another neighbor testified that in 1863, when home on furlough, soldier complained of rheumatism and walked lame, and another swears that while in the service and after discharge he frequently heard soldier complain of rheumatism in his legs and body, and noticed at one time in 1863 that he was quite lame, and after discharge he was still apparently suffering and disabled on account of rheumatism.

It is held that soldier's death from disease of heart can be accepted as due to rheumatism contracted in the service and line of duty.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
December 11, 1901.*

Herewith are returned the papers in the appealed pension case of Mary D. Ramsey, widow of Silas Ramsey, who served during the war of the rebellion as major and additional aid-de-camp of United States Volunteers.

This is a claim under the provisions of section 4702, Revised Statutes. The claimant's husband received his appointment June 13, 1862, and was mustered out April 20, 1866. He died December 18, 1873, without having made any application for pension. His widow filed her application April 7, 1891, and it was rejected in July, 1898, on the ground that his death was not shown to have been due to disease contracted during his military service. From that action an appeal was taken June 30, 1899.

The claimant alleged in her application that her husband died of heart failure, resulting from chronic diarrhea contracted during his army service. Subsequently, before a special examiner on July 8, 1897, she declared that he also contracted rheumatism in the service and that his death was due to the combined effects of chronic diarrhea and rheumatism. The records of the health department of the city of Chicago, where he died, show that the cause of death was organic disease of the heart. It is admitted by the adjudicating officers of the Pension Bureau that he was a sufferer from chronic diarrhea contracted during his army service, but it is held that there was no pathological connection between that disease and the disease of heart, which was the immediate cause of death. It is stated, however, that "if rheumatism is legally established as of service origin, death cause can be accepted as a result thereof." (See opinion of medical referee, dated March 23, 1897.) It is contended in the appeal that the origin of rheumatism in the service is established by the testimony filed.

The records of the War Department show that Major Ramsey was absent from his command on leave from February 3 to May 23, 1863. A paper has been filed showing that he was granted leave of absence February 23, 1863, for twenty days "in consequence of protracted indisposition in the form of chronic diarrhea." There is no further record evidence of disability.

The case, so far as rheumatism is concerned, rests upon the testimony of Dr. Robert Boal, James M. and William J. Fort, and S. B. Garrigus.

Dr. Boal first testified in 1891 to the effect that he treated the claimant's husband while the latter was at home on sick furlough for chronic diarrhea, and prescribed for him occasionally after his discharge, and that he believed the remote cause of his death was the intestinal disease contracted during his army service.

In reply to a letter from the Pension Bureau, asking him to state the nature of the disability for which he treated the soldier after discharge, he wrote, under date of March 1, 1892—

I treated the late Maj. Silas Ramsey for chronic diarrhea while at home on leave of absence. * * * After his discharge I again treated him and, according to the best of my recollection, it was for the same disability. My impression is that it was complicated with rheumatism, but of this I am not positive.

This is the first mention of rheumatism as a factor in the case that appears in the testimony. In an affidavit filed in May, 1897, Dr. Boal stated that his attention having been called to the fact that Ramsey was at home not only in the spring of 1863, but also in 1864 and 1865, he was able to recall that he was suffering from a continuation of chronic diarrhea and the complication of rheumatism in the spring of 1864. Before a special examiner, in October, 1897, he testified that he had a clear recollection of treating the officer for rheumatism as well as for chronic diarrhea while he was at home in the spring of 1863.

Dr. Boal is a man of excellent reputation, and, although over 90 years of age when he testified before the special examiner, the latter states that he found his mind clear and his memory good. It must be doubted, however, whether his recollection of Major Ramsey's ailments was more distinct in 1897 than it was in March, 1892, when he stated that, while he had an impression that the chronic diarrhea was complicated with rheumatism, he was not positive such was the case.

James M. Fort testified in an affidavit filed October 22, 1896, that he saw the claimant's husband when he came home on furlough in the spring of 1863, and that he was then suffering from chronic diarrhea in a very severe form; also that he saw him immediately after his discharge and that he was then suffering from chronic diarrhea and rheumatism, from which he never recovered.

In his deposition before the special examiner this witness said:

It was my understanding he had camp dysentery for one thing when home on furlough and rheumatism for another. I know this from what he said and from what the family said. * * * My recollection is soldier never walked free, and he used a cane after his discharge.

William J. Fort testified in an affidavit filed April 17, 1894, that he saw the claimant's husband during his service when he was complaining of disability, which he said unfitted him for service, the exact nature of which was unknown to affiant. Before a special examiner, on January 20, 1898, witness testified that the time he saw Major Ramsey was when the latter came home in the spring of 1863, and that he then complained of rheumatism and walked lame.

Stephen B. Garrigus testified in an affidavit filed May 10, 1897, that he was well acquainted with the claimant's husband during his lifetime, having been on the friendliest terms and intimately associated with him for about forty years; that he met him several times while he was yet in the service and many times after his discharge, and well remembered of frequently hearing him complain of suffering much from rheumatism in his legs and body, and at times noticed he was quite lame; that he particularly remembered meeting him by appointment at Springfield, Ill., about the month of August, 1863, when he was en route from Vicksburg to New York, and noticing he was quite lame, and that the soldier then told him his rheumatism was troubling him very much; that he remembered the same condition existed when the soldier was at home in the spring of 1864 and again in the summer of 1865, and that when he finally returned home in April, 1866, it was apparent that he was still suffering and disabled on account of said rheumatism.

This witness testified before a special examiner in December, 1897, as follows:

I saw him (claimant's husband) a number of times in service—once at Springfield, Ill., in 1862, and again in 1863, when he was home on sick leave. When I met him at Springfield, in 1862, I stopped overnight with him in the same hotel, and he was then suffering from rheumatism; at least, he showed by his manner that there was some such thing the matter with him, and he was complaining of pain in his arms and legs, and said he thought he had rheumatism. I saw him the morning he got home on furlough in 1863 and he complained then of rheumatism; and later on I met him from time to time, and on a number of occasions he complained of rheumatic pains. We are intimate friends, and I myself was suffering from rheumatism, which developed into heart disease, and we frequently compared notes in relation to our ailments.

All the witnesses are of good reputation for veracity and above the average in intelligence. Garrigus has told a straightforward story throughout, and if he is to be believed there can be little doubt that the claimant's husband suffered from rheumatism while in the service. Dr. Boal's "impression" as to rheumatism is not entirely without

evidential value, particularly in view of the fact that the mention of it seems to have been entirely spontaneous with the witness and not due to any prompting by the claimant as she had not, at that time, declared or made any effort to prove that her husband contracted rheumatism in the service. Other testimony in the case tends to show that rheumatism was present as a factor in the officer's disability very soon after his discharge if not before. The undisputed facts are that he was a man of unusually robust health before he entered the Army; that he was in the service nearly four years; that he returned home broken in health and never regained his former condition, and that he died of organic disease of the heart less than eight years after his discharge. He is said to have been a man of good habits and was, by occupation, a lawyer. After carefully considering all the evidence the Department is of the opinion that it warrants the conclusion that the rheumatism which was an important factor in causing said officer's death was contracted during his military service. The rejection of the widow's claim is set aside and you are respectfully requested to readjudicate the same in accordance with the view above expressed.

INCREASE-DISABILITY-RATE-DEFECTIVE VISION.

JOHN T. WATSON.

In the case at bar, a pension at the rate of \$17 per month is held by the Bureau to be adequate to the degree of disability resulting from total blindness of one eye and loss of nine-tenths vision in the other eye from corneal opacity. In the case of William Moore (12 P. D., 87), considered by the Department upon appeal November 30, 1901, the Bureau had allowed the third-grade rate (\$24 per month) for loss of one eye from traumatism, and loss of nine-tenths vision in the other eye from optic atrophy resulting from said injury.

The inequality in the rates allowed by the Bureau in these two cases for practically the same degree of inability to perform manual labor, of each pensioner, by reason of poor vision, demonstrates the advisability of adopting some method by which a more equable adjustment of rates in cases of ocular injuries can be made.

In the judgment of the Department the rules laid down, the formulas evolved, and the tables prepared showing the relative values of the different defects of vision, by Würdemann and Magnus in their joint work on "The economic valuation of vision," furnish a medium or working basis for a more uniform arrangement of rates in such class of cases.

Accepting their maximum and minimum limits, respectively, of the range of visual acuity necessary as a condition of success in the performance of manual labor, namely, 0.50 (one-half) to 0.05 (one-twentieth) of the full scientific standard, as being both practical and approximately correct, though not controlling, it is quite evident that a visual acuity that is limited to one-tenth of normal, and exists in but one eye (the conditions shown in this case) is a very low grade of vision.

Held: That the degree of disability resulting from the amount of damage to the visual acuity of the appellant in this case is fully equivalent to the loss of a hand or foot for purposes of manual labor, and warrants the allowance of the third-grade rate (the rate allowed in the case cited above, for an equivalent though not identical cause of disability).

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
December 16, 1901.*

John T. Watson, late private, Seventh Independent Battery Ohio Light Artillery, who is now pensioned at the rate of \$17 per month for "disease of eyes, and resulting loss of sight of left eye and impaired vision of right eye," filed an appeal February 15, 1901, from the rejection by the Bureau, on January 21, 1901, of his claim for increase, filed March 12, 1900.

In the said appeal it is contended by the attorney of record in the case that inasmuch as the pensioner is shown by the report of an expert examination that was made of his eyes, in pursuance of his aforesaid claim for increase, to be totally blind in one eye and to have only one-tenth vision remaining in the other eye, he is so nearly blind as to be wholly incapacitated for the performance of any manual labor, and consequently entitled to "at least \$30 per month."

The rate which the attorney claims that the appellant is entitled to is the second-grade rate—the rate prescribed by law for total inability to perform manual labor.

Relative to the said contentions the Bureau submitted the following report, dated May 25, 1901:

This claimant is pensioned at seventeen-eighteenths for disease of eyes, which has resulted, as shown by the expert examination on August 15, 1900, in loss of sight of left eye and ten one-hundredths vision of the right eye. This degree of vision is such as to enable the claimant to count fingers on a hand 20 feet distant. In my opinion the present rate of seventeen-eighteenths is adequate. The action appealed from is adhered to.

The report of the expert examination referred to in the pending appeal follows in full:

Lids of the right eye being averted, the conjunctiva of both the upper and lower were found slightly thickened, with slight cicatricial changes of the upper, but no blepharitis, pterygium, trichiasis, ectropion or entropion; upper half of the cornea covered with a well-marked opacity of a bluish-white appearance; lower half transparent, with the exception of a slight smoky condition, which was more noticeable when attempting to make an ophthalmoscopic examination; pupil a little smaller than the average normal size, and responded very sluggishly to light, but there was no synechia. Crystalline lens, as far as could be ascertained, was in a normal condition, but the density of the opacity of the cornea (upper portion especially) made it impossible to ascertain the real condition of the fundus of this eye to a certainty, but from what I could see would say that the internal media and fundus were in a normal condition.

Vision ten one-hundredths. No material improvement made with lenses.

Left eyelids being averted, the conjunctiva was found thickened with very marked cicatricial contractions of the conjunctiva of the upper lid; the tarsus was so bent as to show very marked convexity anteriorly, with complete trichiasis, so much so that it might be termed entropion; symblepharon lower lid also present in this eye.

The entire cornea of this eye is covered with a thick pannus resembling the infiltrated trachomatous conjunctiva, and is rough or nodulated.

On account of the density of the pannus, vision 0.

As will be observed, the only reason assigned in the report of the Bureau, as above set out, for holding that "the present rate of seventeen-eightieths is adequate," is the assumption that inasmuch as the appellant has "ten one-hundredths vision of the right eye" the "degree of vision is such as to enable the claimant to count fingers on a hand at 20 feet distant." It is not shown, however, as a matter of fact, that he did or could "count fingers on a hand" at such distance, or at any other distance; but assuming that such degree of vision would enable him to count fingers on a hand at 20 feet, or even at a much greater distance, it is not apparent how that fact alone could be taken as a standard by which an adequate rate in the case could be determined. A man with perfectly normal vision can look through a pin hole in a card and see to count fingers on a hand at, perhaps, a hundred feet or more; so, also, might a man whose visual field was equally restricted by great concentric contraction thereof from pathologic causes, provided he still retained normal acuity of central vision; but in each instance there would be total absence of peripheric vision, and in the latter case consequent inability to perform any manual labor, as the conditions would be permanent.

In the case at bar, however, somewhat different conditions present themselves for consideration. According to the findings of the expert examining surgeon, as hereinbefore set out, there is total blindness of the left eye—the entire cornea of this eye being covered with a thick, dense pannus, and there is but ten one-hundredths or one-tenth vision remaining in the other eye—it being "impossible," the examining surgeon says, "to ascertain the real condition of the fundus of this eye," by reason of "the density of the opacity of the cornea (upper portion especially)." As stated in the certificate of the said expert examination, the upper half of the right cornea "is covered with a well-marked opacity of a bluish-white appearance," the lower half being "transparent, with the exception of a slight smoky condition, which was more noticeable when attempting to make an ophthalmoscopic examination."

Thus it will be seen that the field of vision in the right eye—the left eye being totally blind—is not restricted by concentric contraction, as in the hypothetical cases above cited, but by a "well-marked opacity" of the upper half of the cornea and "a slight smoky condition" of the lower half. The visual field in this case, therefore, is not so greatly damaged as it would be were central vision only left, as in the said hypothetical cases, although in the latter objects could be discerned at a much greater distance than in the former, but the field of vision, except for distance, would be so limited that the greater degree of central visual acuity would be of no practical benefit, and would not be nearly so useful as the wider range of vision shown to exist in the former case—the case now under consideration.

The question at issue, then, in the case at bar is, Is the existing rate in the case, seventeen-eighteenths (\$17 per month), commensurate with the degree of disability or incapacity to perform manual labor that would naturally result from total loss of vision of one eye and loss of nine-tenths vision in the other eye, the condition reported as having been found at the last medical examination made of the soldier. The Bureau holds that the said rate is adequate to such degree of disability, but the appellant, through his attorney, contends that he is wholly incapacitated for the performance of manual labor by reason of the aforesaid damage to his visual powers.

In the case of William Moore, formerly second lieutenant of Company C, Seventh Iowa Infantry, and pensioned by certificate No. 25275, at the third-grade rate (\$24 per month), for "loss of left eye, affecting right, from gunshot wound," which was considered by the Department upon appeal November 30, 1901 (12 P. D., 87), the degree of inability to perform manual labor was no greater than that shown in this case, yet the third-grade rate was allowed in the case cited, while it was held by the medical referee that the existing rate in the case at bar, \$17 per month, is fully adequate to such degree of disability. The conditions reported as having been found at an expert examination held in the case cited were: "Loss of one eye; loss of nine-tenths vision of other eye." Although the eye lesions in these two cases are dissimilar, the effect on the earning ability of the appellant in each case is practically the same.

In the case cited the pensioner had appealed to the Department from the rejection by the Bureau of a claim for increase that he had filed in which he alleged that he was wholly incapacitated for the performance of manual labor by reason of the aforesaid causes of disability for which he had been granted a pension. After due consideration of all the facts presented in the case, however, the Department held that the third-grade rate was commensurate with the degree of disability shown to exist as a result of said pensioned causes, and stated in the decision affirming the action of the Bureau in the premises that—

The pensioner is said to have one-tenth vision remaining in the right eye (the left eye being blind), which degree of vision would enable him to perform some coarse manual labor not requiring much acuity of vision, such as that of a farmer or day laborer; and he can not, therefore, be considered, as he alleges, wholly incapacitated for all manual labor, and, consequently, entitled to the second-grade rate.

It was also stated in such departmental decision that—

* * * ability to perform "manual labor," and not ability to engage in the higher professions or trades, has been fixed by law as the standard by which the amount of damage to the earning capacity of a pensioner, or claimant for pension, is to be gauged; and consequently the rate of pension (when nonspecific) to which he may be entitled for the degree of disability from which he is found to be suffering be determined.

This being true, and the degree of vision which the appellant in the

case cited still retained in one eye being considered by the Department as sufficient to enable him to perform, as heretofore stated, a certain amount of coarse work, it was held that he was not entitled to the second-grade rate.

The inequality, however, of the rates in the case cited and the case at bar for, practically, the same degree of disability shows the necessity for fixing some standard by which a more equable adjustment of rates in this class of claims can be made. As a matter of course, the Department does not fail to realize the fact that it is practically impossible to fix any set standard or lay down any rule by which the ability of a man to perform manual labor may be affected by the varying degrees of impairment of vision can be determined to a mathematical certainty, but it is, nevertheless, believed that although the facts and circumstances surrounding each case must enter largely into the question as to the proper rate that should be allowed therein some more desirable method than that of empiric judgment should be adopted as a basis for fixing the rates in such cases.

In the consideration of this question, the attention of the Department has only recently been directed to an elaborate and most highly interesting and instructive discussion of this subject in a paper prepared by Dr. H. V. Würdemann, professor of ophthalmology and otology at the Milwaukee (Wis.) Medical College, with the collaboration of Dr. H. Magnus, of Breslau, Germany, professor of ophthalmology in the University of Breslau, and read by Dr. Würdemann before a joint meeting of the Chicago Ophthalmological and Otological Society and the Medico-Legal Society, of Chicago, Ill., February 18, 1901.

This paper, entitled "The economic valuation of vision," was published in the April number of *Annals of Ophthalmology*, designated as "A Quarterly Journal and Review of Ophthalmic Science."

As introductory of his remarks, Dr. Würdemann said:

For several years I have been particularly interested with the subject of visual economics, my attention being directed to it by the work of Prof. H. Magnus, of Breslau, Germany.

By his methods for determination of the percentage of economic damage to the individual following accidental injuries to the eye, I am convinced that a correct estimation of the effect of the injury upon the earning powers may be obtained. This factor being determined by a properly carried out professional examination and by a scientific adaption of the other factors relating to the particular case, a basis for settlement may be fixed and thus the almost hopeless confusion of the subject and empiric methods now existing in the courts may be relieved.

He then gave the following:

BASIS FOR SCIENTIFIC VALUATION.

In dealing with the valuation of quantities, powers, or functions which have varying values in different individuals, we are forced from beginning to start with certain axioms that are in themselves expressions of averages. These may only be properly used if they have been obtained in a scientific manner by the results of examinations

of large numbers of individuals. In this manner the unit for measurement of machinery, the horsepower, has been obtained: It is known that horses vary in strength, but science has taken as its standard the strength of the average horse, which can lift 33,000 pounds 1 foot in one minute. The wages of a day laborer may fluctuate from 50 cents to \$5; yet, for scientific purposes, we might express his average earnings at the rate of \$2 for a day's work. For both scientific and practical purposes we are enabled to utilize mathematical equations for the calculation of the results of certain damages to standards which have been evolved from such average estimations. Another axiom which must be accepted is the supposition that in professions and trades requiring eyesight, a blind person is totally incompetent to work. The possession of good functional powers, especially vision, is the principal factor for full earning ability. We even consider that the earning ability for any gainful vocation requiring eyesight is practically synonymous with the visual earning ability, and that injuries to the eyes affecting the vision have a direct detrimental effect upon the earning capacity of the individual. It is fortunate that the state of ophthalmic science allows of a definite expression of the working powers of the eye and of a proper valuation of the factors entering into vision. The economic loss of an arm or leg or the loss of the sense of smell or hearing can not be as exactly estimated as that of the loss of the sense of sight. An injury to the former but partially and temporarily affects the earning powers, whereas good vision is one of the chief factors in personal economics, for gainful occupations may only be followed when the sense of sight and mental faculties are unimpaired. The loss of visual power invariably has a deleterious effect upon the calling, depending upon the degree of damage and the nature of the vocation, which may be shown in dollars and cents. In determining the amount of damage following an accident the only factor that can be fixed with scientific exactness is the actual loss to the earning ability, and this should be the principal basis for settlement of all claims.

PRESENT EMPIRIC METHODS USED FOR SETTLEMENT OF DAMAGES.

As is well known, the measure of damages is a matter which is now empirically settled by the courts. The injury or loss for which compensation is set is sometimes given "nominal" damages, in other cases "substantial" or "compensatory" damages, the monetary amount being arbitrarily fixed by the courts after weighing the evidence. There is no scientific estimation of the economic damages. * * *

The estimates made by the accident insurance companies are likewise based upon empiric ideas and the results of experience. The same may be said of the United States Bureau of Pensions. * * *

We have certain scientific standards by which the various factors composing the sense of sight may be accurately measured. These factors have been reduced to mathematical elements, in a working formula by Professor Magnus, of Breslau, Germany, to which I have given considerable study, and by which I am convinced that a scientific estimate of the economic damage to vision in the case of eye accidents can be made in every case by which a just and equable amount of indemnity can be estimated.

The manner in which the development of a mathematical formula for the estimation of economic valuation of vision according to the method of Magnus was then explained. The various formulas evolved appear in the paper referred to, but for obvious reasons they can not be reproduced herein.

By taking the several factors forming what the doctor terms "the earning ability," and placing them in his different formulas according to their relative values, as affected by the extent the single factors are

injured, he shows how the amount of "damage to the earning ability" in any given case can be determined, approximately at least.

This method of reaching a conclusion as to the degree of impaired earning ability in cases of ocular injuries is of peculiar value in those cases in which the amount of pecuniary loss of the individual sustaining such an injury is to be determined in suits for damages in courts of law. Relative to this phase of the question, Würdemann says:

If we wish to exactly estimate the damage to the individual case, we must, therefore, figure with the compensation that the individual himself has been getting and his probable further earnings.

Claims for pension, however, are not settled upon this basis, the rates allowed in each case (when nonspecific) being determined by the extent to which the claimant is shown to be incapacitated for the performance of manual labor, without regard to the nature or character of his vocation in life. But some of the rules laid down, and tables prepared as to the "relative valuation of the different defects of the visual field," by Würdemann and Magnus are believed to be applicable to a large number of cases involving questions similar to the one at issue in the case at bar.

They give the following rules for the—

ESTIMATION OF DAMAGES TO ECONOMIC VISION.

Normal physiologic vision consists of a series of different factors: The central acuity, the visual field, light and color sense, the adaptive faculty, the muscular movements, and cerebral processes, all acting together in creating the sense of sight. We may therefore regard the act of seeing as a sum whose numerals are formed by the different functions. If one numeral be taken from the sum which represents the complete act of seeing, then a balance will be left and vision will be damaged to the extent of the loss of one function, but in a limited way it is yet in existence. In the manufacture of a formula for physiologic vision we have to consider that in losing simultaneously the two most important factors, central and peripheric vision, the act of seeing would be nil; but in the estimation of economic vision we have to use a different method, for the different secondary functions forming sight have different valuations. * * * If a person loses his central acuity we certainly have complete earning disability, for a large central scotoma certainly causes economic blindness; total paralysis of the ocular muscles would keep the eyes immovable and prevent work. Great contraction of the visual field, so that only central vision would be left, certainly prevents the person earning anything by the aid of his eyes.

THE ECONOMIC LIMITATIONS OF THE CENTRAL VISUAL ACUITY.

The central acuity lies within well-known physiologic limits. When it falls below these the function itself is damaged; but the conditions met with in practice are not such that the physiologic and earning limitations of the central visual acuity are interdependent—for instance, science calls an individual blind only when perception of light has entirely disappeared, but in actual practice he is blind if the faculty of sight has been weakened to such an extent that the organ of sight can not be used to earn a living. Thus the meaning of blindness, as used in daily life, is much narrower than that of science.

Now and then extremely great demands may be made upon certain organs which may reach to its highest ability. In actual practice we are satisfied with the amount of labor which does not strain the powers. There is hardly any vocation which demands the extreme limit of sight (according to scientific figures) as a condition of success, and in each vocation a great many individuals may be found who have comparatively poor sight, but the same earning ability as those with normal eyes. Neither the lowest nor the highest points of scientific visual acuity correspond with those used in business; the lowest point of the latter is not as low as the lowest laid down by science, while the highest point of the functional range that may be regarded as normal must be considered below the highest scientific limit.

Certain estimations of the working acuity have been made from experience, and thus we have determined that ordinary coarse work, such as that of a farmer or day laborer, does not require more than one-half the normal as a condition of success; for instance, if a day laborer would suddenly have his vision reduced to not more than 0.50 he would be able to go on with his work, but if a skilled mechanic would suddenly lose this amount of vision he would have to stop, as he is used to work with clear retinal impressions, but if he would only lose one-fourth of his visual acuity he would yet be able to do all his work. If the common laborer's vision should drop to less than 0.05 he would be blind for all working purposes, and the same may be said of the skilled artisan if his vision drop below 0.15. Therefore, out of these four limit values we construct two ranges within which the professional or economic limits may lie. One of these ranges would have as its highest limit 0.75 (three-fourths), as the lowest 0.15 (one-seventh), while the other range would be between 0.50 (one-half) and 0.05 (one-twentieth) of the normal scientific standard for visual acuity. It is not necessary that the maximum and minimum limit values exist in both eyes. It is sufficient that they may be shown in one eye, the other having a lesser acuity than that which we have declared as absolutely necessary for professional demands. * * *

Individual members of certain trades do not have exactly the same visual demands made upon them. We must remember this fact and not judge all the members of the same trade by the same standard. It is advisable to reach some definite agreement as soon as possible, as hitherto there has been a disposition among oculists to consider full visual acuity according to the scientific standard as the basis for the valuation of the conditions met in practical life. If the estimation of the results of the amount of damage arising from ocular injuries is to be made in a just manner, according to actual conditions, this custom must be abandoned.

Our views regarding the difference between the scientific and working standards of visual acuity can claim far more extensive practical consideration than that which relates alone to the subject in hand of ocular injuries. All professions or vocations which make admission dependent upon a degree of vision would do well to remember that practical visual acuity and that of the scientific standard are entirely different things, and that an individual who by the scientific standard shows a deficit may have, for working purposes, a full amount of vision.

As a new departure, and a matter of no little interest and importance as well, it is noted that these observers hold that it is unnecessary to possess the extreme limit of sight, from a scientific standpoint, as a condition of success in "hardly any vocation" in life. But one-half of the "normal scientific standard for visual acuity" is held to be sufficient "as a condition of success" in the performance of ordinary manual labor, "such as that of a farmer or day laborer," or for other coarse work; and but 0.75 (three-fourths) of such standard is held to

be equal to the demands of the "professions and trades requiring higher degrees of visual acuity." The lowest limit of acuity of vision that would enable either of these classes to follow, in any degree whatever, their respective vocations, is fixed at 0.05 (one-twentieth) of the normal scientific standard for the former class, and 0.15 (one-seventh) for the latter. The former class, or the class requiring only the "lower degrees of visual acuity," is, therefore, the only class that can be considered for comparative purposes in the adjudication of claims for pension on account of damage to the visual organs.

In the judgment of the Department, the rules for the "estimation of damages to economic vision," as above set forth, are wholly practical, and offer a medium for a more uniform adjustment of rates than prevails at present in claims for pension involving such causes of disability. But, as above stated, the range constructed out of the "limit values" fixed for the group of trades requiring only the lower degrees of visual acuity, namely, "0.50 to 0.05 (scientific standard)" is the one with which we have to deal in the consideration of the question at issue in the case at bar. And it is believed that the said "economic standard" will not only be more fair to the Government than the "scientific standard" is, but that it will, at the same time, be perfectly just to the claimant or pensioner. But in adopting such standard as a basis for fixing rates in certain cases it is not the intention of the Department to interfere with the practice of allowing merely nominal rates for minor ocular injuries that would hardly constitute a ratable degree of disability under such standard. It is stated in the paper herein referred to, and quoted from, that:

If the common laborer's vision should drop to less than 0.05, he would be blind for all working purposes.

In the claim under consideration the appellant's visual acuity has dropped to 0.10 (scientific standard), but such degree of vision remains in but one eye—the other one being totally blind. Würdemann states, however, that:

It is not necessary that the maximum and minimum limit values exist in both eyes. It is sufficient that they may be shown in one eye, the other having a lesser acuity than that which we have declared as absolutely necessary for professional demands.

But in the case at bar the "other" eye has no vision whatever. That the appellant in this case has a very low degree of visual acuity is shown beyond question, and were he a skilled workman his earning ability, even from an economic standpoint, would be practically nil; but inasmuch as the degree of his incapacity for the performance of manual labor is the standard by which his alleged title to a higher rate of pension is to be determined, that phase of the question only will be considered; and in view of the fact that 0.05 Snellen visual acuity = inability to earn, it is apparent that this appellant, who has but 0.10, or

probably less, acuity of vision, can perform but little effectual manual labor. He might do a certain amount of coarse work, or odd jobs, etc., but his earning capacity would be very limited; and the degree of his disability is, in the judgment of the Department, fully equivalent to the loss of a hand or foot for purposes of manual labor. Furthermore, in a given case of corneal opacity, or damaged vision from any cause, there are other issues besides impairment of vision to be taken into consideration. "The ability of the individual to compete in the labor market" is one of the four factors inserted into the formula evolved by Würdemann and Magnus for estimating the earning ability of such individual, but is accorded a smaller value than the other three factors. Relative to the meaning of the term "ability to compete," they say:

The ability to compete has been inserted into our formula for the full earning ability with a smaller value than the other three factors. A few remarks regarding the position of this factor in the estimation of the injury to the ocular earning ability follow:

When an individual receives an accidental injury, especially that of vision, the damage to him is a double one. First, there is the impairment of his working ability, by which he can not perform as much or as good work as formerly; and second, his chances for obtaining work quickly and easily have become less. Practical experience shows that a one-eyed person not only has more difficulty in finding employment, but his visual disorder makes it difficult for him to retain that employment which he has. Workmen with normal functions are preferred by most employers of labor, and not without reason. The injured person, therefore, has a right to claim not alone compensation for the impairment of his capacity for work, but also for the difficulty which he encounters in making the most of this capacity. Therefore, in estimating the impairment of the earning ability we have always and under all circumstances to consider the diminution of the ability to compete.

The Department has heretofore held, and still holds, that when the ability of a pensioner, or claimant for pension, to secure employment is affected by the cause of disability for which he is pensioned, or on account of which he seeks a pension, such as pronounced or great physical deformity, especially of a repulsive nature, that inability to obtain, as well as to perform, any remunerative work should be considered as a factor in determining the rate in the case.

In the case under consideration the appellant's eyes, especially the left one, have an unpleasant appearance, to say the least, and such fact would, no doubt, interfere to some extent with his "ability to compete in the labor market;" but that fact can not operate to still further increase the rate at which the Department has decided that he should be pensioned, namely, third grade (\$24 per month).

In view of the facts herein set out the action appealed from is hereby reversed.

LEGITIMACY—EVIDENCE—PROOF OF DEATH.

CORA B., MINOR OF THOMAS J. FOX.

The evidence shows that the mother of this claimant married one Little in 1877, in Pike County, Ark., and in the same year removed to Hempstead County, in the same State; that said mother returned to her relatives and friends in Pike County, in 1879, and reported that said husband was dead, bringing an infant son by said marriage with her; that in 1883 she married claimant's father, Thomas J. Fox (now deceased), who survived her; that it was understood and believed by her relatives, friends, and neighbors that said former husband died in 1879, said son by said former husband testifying, also, that he resided with his mother until her death in 1885, and was always told that his father died while he was a small child.

It is held, in harmony with the cases of *Kelly's heirs v. McGuire et al* (15 Ark., 605), and *Wilson v. Brownlee* (24 Ark., 586), that declarations by members and relatives of the family, or general reputation in the family, are good evidence to establish death, heirship, and the like, though disconnected with any question of pedigree; and in this case satisfactorily establishes that claimant's mother's first husband died prior to her marriage to her father, Fox, and that said marriage was legal, and she is the legitimate daughter of said soldier.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
December 30, 1901.*

Cora B. Fox, as minor child of Thomas J. Fox, formerly sergeant, Company D, Sixth Tennessee Volunteer Cavalry, by her guardian, William D. Fox, filed a claim for pension under the act of June 27, 1890, October 20, 1894, which was rejected March 22, 1899, in the following stated language:

Reject on the ground of declared inability to prove death of a former husband of minor's mother, prior to her remarriage to soldier, hence the legitimacy of the child claimed for.

On the same day, and for the same reason, a claim for accrued pension under the act of March 2, 1895, was rejected. June 19, 1899, appeal was taken from both actions to the Department by the claimant, alleging as grounds therefor that said actions were contrary to the evidence in the case, and the law applicable thereto.

As both claims rest upon the same essential facts, and as a disposition of one will also dispose of the other they will not be separately considered.

The soldier died August 24, 1894, and at the time of his death was in receipt of a pension at the rate of \$12 per month under the act of June 27, 1890.

The facts in the case, as disclosed by the evidence, are substantially as follows:

On or about the month of August, 1877, the mother of the claiming minor married one Publication Little, in Pike County, Ark., and in the

fall of that year the married couple moved to Hempstead County, Ark., in May or June, 1881, the mother of the minor returned to Pike County and reported that her husband died in the year 1879; on the 24th of May, 1883, the mother married the soldier, by a ceremonial marriage in conformity with the law of Arkansas; April 1, 1884, the minor was born; the mother died on October 31, 1885; the soldier did not remarry after the death of the mother.

It is to be noted that the marriage of the soldier to the mother of the minor is fully established by record evidence that it was in conformity with the law of the State of Arkansas, within the borders of which said marriage took place.

There is no record of the marriage of mother of the minor to Little, but it seems fairly well established by lay testimony, and, indeed, it is immaterial whether the marriage to said Little was fully in conformity to the law of Arkansas or not, but in order that the issue may be clearly defined it may be assumed that the prior marriage was legal in all respects.

It must be admitted that when this claimant produced record evidence of the mother's marriage to the soldier in accordance with the law of Arkansas, and evidence of the birth of the minor as a result of the marriage, the death of the mother and the death of the soldier, that she made out a prima facie case.

The question is, does the evidence warrant the conclusion that the marriage as proven is null because there had been a prior marriage by the mother, and the death of the former husband has not been proven.

Under the provisions of the act of August 7, 1882, the legality of the marriage of the mother and the soldier must be tested by the law of the State of Arkansas, and the decisions of the supreme court of that State in like cases.

In the case of *Sharp v. Johnson* (22 Ark. 79), in discussing the validity of a marriage where right to property was involved, the supreme court said:

And every person, until the contrary is proven, is presumed to be innocent of a supposable or of an imputed crime. These presumptions may sometimes clash with each other, and then it is for the law to declare which is to prevail. In this case the opposing counsel were each insisting on the benefit of a presumption in their favor; the plaintiff's counsel on the presumption of John B. Powell's innocence of the crime of bigamy; while the defendant's counsel wished an application of the presumption of life alone, and the question was, which is the stronger presumption? The court answered the question in favor of innocence, and it did right.

In the same case the court cited the following with approval:

An eminent writer also says: "A charge of an act of immorality or of disobedience to a positive law will not be received unless supported by direct evidence. Circumstances showing probability merely are, in such cases, not enough; the fact averred must be conclusively proved." (Matthew's Presumptive Evidence, 28.)

In the case of Halbrook v. State (34 Ark. 511), the supreme court said:

There was also a presumption that appellant's marriage was lawful, innocent, and not criminal. It is supposed that a man will not incur the guilt of felony, and the danger attending it by marrying another woman during the life of one to whom he has been previously lawfully married.

It is clear that in Arkansas the mere fact that there had been a prior marriage by one of the contracting parties to a proved marriage in accordance with statutory forms would not be sufficient of itself to make such a marriage null and the issue thereof illegitimate.

But this is not all there is to this case. There is evidence, competent in such case, tending to establish that some four years prior to the marriage in issue in this case the husband by the prior marriage died.

William D. Fox made affidavit, in part, as follows:

That as such guardian (of minor) he has been unable to find anyone who has personal knowledge of the death of one Little, or Pub. Little, who was the first husband of the late Rusha Fox, who was the mother of the said minor, Cora Belle Fox. Affiant further states that he has been a resident continuously of Pike County, Ark., since the year 1881, and that he has not seen or otherwise had any knowledge of the said Little, and that his destiny or whereabouts are unknown to these people since the years 1878 or 1879.

Samuel A. Musgrove made affidavit, in part, as follows:

That he has been continuously and uninterruptedly a resident of Pike County, Ark., each and every year since the year 1853, and that on or about the year 1874 he became acquainted with Publication Little, who married a Miss Rusha Harkness; that the last he ever saw or knew of the said Little was during the year 1876; he, the said Little, was then living on the Hoover place, on the Little Missouri River, in Pike County, Ark.; he further states that his understanding is that the said Little, with his wife, removed from Pike County, Ark., and that the said Little died on or about the year 1878 or 1879, and his said wife then returned to her kindred and friends at Pike County, Ark., and she subsequently married Thomas J. Fox on or about the year 1883. * * * Your affiant further states that while he is unable to give true and exact dates, yet he is enabled to know and state the above facts by reason of his personal knowledge and acquaintance with the persons and surrounding circumstances usual with neighbors and friends residing in a country district. Your affiant further states that he has every reason to believe, and verily does believe, that the said Publication Little is dead, and died as above stated. His reason for this belief is based on the fact that his said wife returned and so reported his death, and the kindred and friends of said Little have never heard of him or had any knowledge of him since her return as aforesaid.

Mary J. Self, a married sister of mother of claimant, made affidavit, in part, as follows:

She (said mother) first married one Pub. Little at Pike County, Ark., on or about August, 1877, and they removed that fall to Hempstead County, Ark. My said sister, Rusha Little, returned to Pike County on or about May or June, 1881, and reported that her said husband, Pub. Little, had died at Hempstead County, Ark., during the year 1879: and I have every reason to believe said Little died as reported, as I have never seen or heard of him since 1879. * * * On her return to Pike County in

1881 she came to my house and resided with me until her marriage to Thomas J. Fox. My sister had only one child by said Little, a son, Luther Little, now a young man about 18 or 19 years of age, and still living near me.

Joseph Pierce and America Pierce, husband and wife, made affidavit that they became residents of Pike County, Ark., in December, 1881, and then became acquainted with Rusha Little, mother of the minor. At that time she was known as the widow of "Pub. Little," who was reported to have died in Hempstead County, Ark., previous to that time.

Luther E. Little made affidavit that he is a son of "Pub. Little," and "Rusha Little;" that he was born May 11, 1878, and that he resided with his mother up to the date of her death; that he has no remembrance of his father; that he has always understood that his father died when he was a mere child in Hempstead County, Ark., and he has every reason to believe that his father died as reported. At the date of the affidavit affiant was 20 years of age, and he has never heard from or of his father.

In *Kelly's Heirs v. McGuire et al.* (15 Ark., 605) the supreme court said:

Declarations of members or relatives of the family, or general repute in the family are good evidence to establish marriage, birth, death, heirship, and the like, and may be proved by others as well as surviving members of the family.

In the case of *Wilson v. Brownlee* (24 Ark., 586) the supreme court used this language:

The death of an individual, though disconnected with any question of pedigree, may be proved by hearsay, subject to the same restrictions as where matters of pedigree are involved.

Indeed, it is a rule of evidence long established that in matters of pedigree, birth, death, and marriage, hearsay evidence is competent evidence to establish the fact. (See 1 Green. Ev., secs. 103 and 105; Bouv. Law Dic., subject, "Pedigree," and cases cited; Scott's Lessee *v. Ratcliff*, 5 Peters, 81.)

The authorities all agree that reputation and hearsay *prima facie* establish a death; and it is equally true that general rumor is frequently the only means by which the death of an individual can be established.

In this case the evidence establishes that in 1877 the mother married one Little; that she moved away from where she had lived to another county; in 1881 she returned, accompanied by a little son, and reported that her husband had died in 1879; in 1883 she married the soldier. Her statement that her husband died in 1879 is corroborated by the fact that no one has ever seen him since the alleged date of his death. In view of all these facts, together with the decisions of the courts of the State of Arkansas, the mother would be recognized as having been lawfully married to the soldier. This being so, the minor in issue has

a clear title to pension under the law. Two legal forces conspire to make such title. The first is the very strong presumption that the ceremonial marriage carried with it all necessities to a valid marriage, such as capacity, etc.; and the second is that the evidence in this case is such that satisfies the mind of its truth, and comes from competent sources under the law of evidence generally and the rule of evidence obtaining in the Arkansas courts.

The action of the Bureau from which appeal was taken is reversed, and the papers are returned for an adjudication of the claim in conformity with this opinion.

MARRIAGE—IMPEDIMENT—VOID MARRIAGE—ACT JUNE 27, 1890.

SARAH SANFORD (WIDOW).

The deceased soldier was first lawfully married in 1857, in Mifflin County, Pa., to one Amelia Ryan, with whom he lived as his wife until 1866, when he deserted her and went to Platte County, Mo., where he married one Elmyra Burns, in August, 1867. He deserted this second wife, Elmyra, in a few months, and there is no proof that he ever lived with her, or acknowledged her as his wife afterwards. The evidence shows that the soldier was never divorced from his first wife, Amelia, who is shown to have died in 1878. He married the appellant, Sarah Waddle, in Calhoun County, Ill., in 1887, nine years after the death of the first wife, Amelia, and lived with her as his wife until his death in 1894.

Held: That the second marriage of the soldier to Elmyra, while the first wife was living and undivorced, was illegal and absolutely void, never became a lawful union, and constituted no bar or impediment to his marriage to this appellant in 1887, after the dissolution of his first, and only lawful prior marriage by the death of Amelia, and that the appellant is shown to have been the lawful wife of the soldier, and should be accepted as his widow for pensionable purposes.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions
December 30, 1901.*

Sarah Sanford filed in the Pension Bureau on June 13, 1894, an application for pension under the provisions of the third section of the act of June 27, 1890, as widow of James Sanford (deceased), late a private in Company I, Seventh Pennsylvania Volunteer Infantry, Company A, Forty-sixth Pennsylvania Volunteer Infantry, Company E, Twentieth Pennsylvania Volunteer Infantry, and Company C, First Provisional Pennsylvania Volunteer Cavalry, alleging the death of said soldier on April 27, 1894, leaving her as his widow surviving, without other means of support than her daily labor. Said application for widow's pension was rejected on August 1, 1899, "upon the ground that, after special examination, during which all known sources of information had been exhausted, the evidence fails to prove the claimant is the legal widow of the soldier."

From said action of rejection the present appeal was taken on October 25, 1899.

The evidence in the case shows that the deceased soldier served in the above-named organizations for more than ninety days during the war of the rebellion, that he was honorably discharged from said service, and that he died upon the date alleged.

The only question presented for consideration by the present appeal, and arising under the action rejecting the claim, is whether the proof on file is sufficient to establish the fact that this appellant was lawfully married to the soldier, and can be accepted as his widow for pensionable purposes.

The case has been thoroughly and carefully investigated by a special examination, and all sources of information bearing upon the point at issue have apparently been exhausted, and, although the evidence on certain points is exceedingly meager and somewhat unsatisfactory, sufficient facts have been developed to enable the Department to determine with reasonable certainty the question at issue.

The evidence shows that the deceased soldier was first married in 1857, in the town of Lewiston, Mifflin County, Pa., to Amelia Ryan, by a lawful ceremony performed by a justice of the peace, and that he lived with Amelia in said place, with the exception of the time he was absent during his service in the Army, until some time during the year 1866, and that two children were born of said marriage, both of whom died prior to the soldier's discharge from the service. In 1866 the soldier deserted Amelia, left his home in Mifflin County, Pa., and went to Platte City, Platte County, Mo., where he appears to have remained about two years, and where he married, on August 27, 1867, one Elmyra Burns. The evidence shows that he deserted this second wife, Elmyra, within a few months after his attempted marriage to her, and left Platte County, Mo., some time in the first part of the year 1868, and there is no proof in this case that he ever lived with her for a day, or ever acknowledged her as his wife after the time that he left her, as aforesaid. At the date of the soldier's marriage to Elmyra the evidence shows that his first and lawful wife, Amelia, was living in the State of Pennsylvania, that she never obtained a divorce from the soldier, and that she continued to live in Mifflin County, Pa., until May 30, 1878, upon which date she is shown to have died. The soldier never applied for or obtained a divorce from his first wife, Amelia, in Platte County, Mo., nor did he do so in Pike County, Mo., where he is shown to have gone when he left Platte County, and where he remained for a considerable length of time; but just how long, or when he left this latter place, does not appear. The evidence shows, however, that while the soldier lived in Pike County, Mo., he cohabited with no woman as his wife, and represented himself to be an unmarried man. The evidence also shows that the soldier resided in Morgan County, Ill., during a portion of the year 1883, the year 1884, and part of 1885, and at this time he had no wife living, and passed as a single man. Some time during the latter part of 1885 the soldier is

shown to have returned to Pennsylvania, where he lived with a sister in Armstrong County, that State, during the year 1886. The testimony of this sister shows that while the soldier lived with her, although as a matter of fact his first wife Amelia was then dead, he represented to her that he was still married and living with Amelia in Lewiston, Pa. The soldier left Armstrong County, Pa., and went to Calhoun County, Ill., in the latter part of the year 1886, where he married this appellant, Sarah Waddle, on August 31, 1887, and lived with her as his wife continuously, in said county and State, until his death upon the date aforesaid. This last marriage of the soldier to the appellant was duly and regularly celebrated by a justice of the peace, in accordance with the laws of said State, and is proven by a duly certified copy of the public record of said marriage in said county.

Under the foregoing facts, which are well established by the evidence, there can be no question as to the legality and regularity of the marriage of this appellant to the soldier, and that she was his lawful wife, and should be accepted as his widow for pensionable purposes. The facts in the case render this so plain and obvious as to preclude the necessity for the citation of any legal authority to sustain it. At the time the soldier married the second wife, Elmyra, his first and lawful wife, Amelia, was shown to be living and undivorced. She lived until 1878, and there is not a particle of proof that the soldier ever lived with the second wife, Elmyra, for a single day, or that he ever saw her or acknowledged her as his wife after the death of the first wife, Amelia. The second marriage to Elmyra was, therefore, illegal and absolutely void in its inception, and there is no proof that it ever at any time became a lawful union. On the contrary, the evidence shows with reasonable certainty that it never did become a lawful marriage, and that the soldier himself repudiated it, and never considered himself as legally bound and married to Elmyra. There is no proof that the soldier ever formed any other matrimonial union, or ever married or attempted to marry any other women than those above mentioned. Consequently, at the time of the soldier's marriage to this appellant in 1887, nine years after the dissolution by the death of the first wife of his only prior lawful marriage, no legal bar or impediment whatever existed to his lawful marriage with the appellant, and he was free to consummate a legal matrimonial union with her, and did do so. The facts in this case, as shown by the evidence, afford no basis or ground whatever for holding the marriage of the appellant to the soldier to have been illegal or invalid, or for refusing to accept her as the lawful widow of the soldier for pensionable purposes.

In view of the foregoing the Department holds that the rejection of this claim for widow's pension upon the ground stated was erroneous, and therefore said action is hereby reversed and set aside, and you

are directed to cause said claim to be reopened and readjudicated upon its merits, accepting this appellant as the lawful widow of the soldier for pensionable purposes.

Herewith are returned the papers in the case.

FEE—REFUNDMENT—JURISDICTION—FUND.

HARVEY HARRINGTON (CLAIMANT).

MILO B. STEVENS & Co (ATTORNEYS).

As but one fee can be certified on each issue to allow pension in a claim where such fee was erroneously certified and paid to an attorney and he refuses to refund the same, the Commissioner can not certify another fee to the attorney entitled to the one so paid, as there is no fund from which such fee may be paid.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
December 30, 1901.*

Milo B. Stevens & Co., of Washington, D. C., on September 24, 1901, entered a motion to reconsider the decision of the Department affirming the action of the Bureau in the matter of fee on the issue of October 28, 1898, in the above-entitled case.

On said issue the action of the Bureau was affirmed upon the ground that—

As but one fee can be certified on each issue to allow pension in a claim where an attorney refuses to refund a fee which was erroneously paid him, action refusing another fee to the attorney entitled to the one so paid is proper.

On appeal the argument of the appellants was directed to show that, under the authority of the decision of the Department in the case of Henry N. Rothery (11 P. D., 255), a fee in a claim for pension can be paid to the attorney entitled thereto, although a fee has been paid in the particular case to another attorney, who has refused to refund the same.

In the decision of the Department it was explained wherein the decision in the case of Rothery (*supra*) was not applicable. The appellants in this motion summarize the decision of the Department into propositions as follows:

1. Unquestionably the Commissioner of Pensions, from a legal point of view, makes payment of a fee as the agent of the claimant.
2. All of the pension is paid to the claimant, although a part thereof is paid to the attorney.
3. Payment of a part of the pension to another person without any law authorizing it is ineffective as against the person entitled thereto.
4. Whether the Commissioner of Pensions pays the fee to the attorney entitled thereto or to some other attorney the payment is lawful.

5. The law authorizes the Commissioner of Pensions to certify but one fee from the money secured in a claim for pension. When he has certified such fee he has no authority to certify another, and there is no other fund from which fee can be paid.

The appellants admit that the first three propositions are logical, but attack the last two on legal grounds. They argue that if as the agent of a claimant the Commissioner of Pensions certifies a fee to an attorney who has no title thereto he is authorized by virtue of his agency to certify another fee to the proper attorney. They base their view upon the principle underlying the common law rules of agency.

The Commissioner of Pensions is not the agent of the claimant by his appointment, but by the statute law which gives said officer the power to certify a fee in a pension claim to an attorney. In such capacity the act of the Commissioner of Pensions is not the act of the claimant, as it is the act of the law. So, when the Commissioner has certified one fee he has fulfilled the law; has legally, though he may not have properly, carried out its mandate. Consequently, where he has paid a fee to the wrong attorney he can do no more than correct his error by recovery of the fee. If he is unable to do this his power is exhausted, as the law does not specifically clothe him with authority to certify another fee and such authority can not be inferred from the wording of the statute. In this connection and as a reason which the appellants advance for the unsoundness of the fifth proposition deducted by them from the decision of the Department, they submit that the law does not prohibit the Commissioner of Pensions from certifying two fees, but prohibits an attorney from receiving two fees; and, as they, as yet, have not received any fee in this case, although the Commissioner of Pensions has certified one fee, there is no law preventing the certification of a fee to them.

It is manifest that while the law does not prohibit an attorney from receiving his legal fee from the hands of the Commissioner of Pensions, it does not follow that the law supplies the Commissioner of Pensions with funds from which to certify fees until he has certified a fee to the proper attorney. Although appellants may be entitled to a fee they can not receive one unless the Commissioner of Pensions can certify one to them. The question as to their title to a fee is not in issue.

Appellant. also submit that there is a fund, viz, the current pension of the claimant, from which a fee can be paid. It is true that when the Commissioner of Pensions has failed to certify a fee from the first payment of pension made in a claim he can certify a fee from a subsequent quarterly payment of pension to a claimant; but this is only in the event which has been stated. If he has certified one fee he has no power to certify another, as his agency from the claimant for the purpose of certifying fees, conferred upon him by the statute law, has

been exhausted. And as there is no other way than through such agency that a fee can be lawfully certified, it follows that the conclusion reached by the Department in this case is a proper deduction from the statutes.

One of the conditions of the contract between the appellants and the claimant implied by law is that they should receive their fee for the prosecution of this claim through the agency prescribed by the law for the payment of fees in pension claims. With this agency the claimant has nothing to do. The appellants by entering into a contract for the prosecution of a claim for pension thereby submit their right to all conditions and contingencies which the law imposes and specifies.

As was observed by Mr. Justice Brewer in *Frisbie v. United States* (157 U. S., 166):

Congress being at liberty to give or withhold a pension, may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to pension and no man has a legal right to interfere in the matter of obtaining pension for himself or others. The whole control of that matter is within the domain of Congressional power.

For the prosecution of a claim for pension under the act of March 3, 1901, an attorney can not receive any compensation for his services whatever either directly or indirectly from the claimant, or from any other person. (Francis A. Patterson, 12 P. D., 29.) There are other claims for pension in which, under the provisions of the law, an attorney can receive a fee limited in amount for his services therein. But in these claims, of which the present claim is one of the class which they include, the attorney contracts for the fee in this and in each particular case, subject to the restrictions imposed by law as to the amount of fee which can be paid, and likewise as to the implied contingencies upon which any amount whatever can be certified. One of the latter is, as shown in the present claim, that there must be a fund from which the fee can be paid and from which the Commissioner of Pensions has not exhausted his authority for certifying fees.

No error appears in the decision of the Department, and said motion therefore is overruled.

EVIDENCE—PRESUMPTION OF DEATH—ACT MARCH 13, 1896.

MARY L. REESE (ALLEGED WIDOW).

As appellant's husband (the soldier) had not been absent unheard of for seven years next preceding the filing of her claim for pension, and no evidence tending to show his death prior thereto having been furnished, she can not be held to be said soldier's widow and entitled to pension on account of his service and death.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
January 10, 1902.*

Mary L., as widow of Humphrey Reese, formerly private, Company E, Eleventh Illinois Volunteer Cavalry, filed a claim for pension under the act of June 27, 1890, August 13, 1890, which was rejected July 19, 1899, in the following-stated language:

Approved for rejection on the ground of claimant's inability, aided by special examination, to establish the death of the soldier, or furnish any satisfactory evidence on which to base a presumption of death. On June 12, 1883, he appeared before the board of surgeons for examination, and no ratable disability was found. He then resided at Pekin, Ill.

February 9, 1901, the claimant filed an appeal to the Department, alleging that the Bureau was in error in its conclusions from the evidence in the case and the law applicable thereto.

The act of March 13, 1896, is as follows:

That in considering claims filed under the pension laws, the death of an enlisted man or officer shall be considered as sufficiently proved if satisfactory evidence is produced establishing the fact of the continued and unexplained absence of such enlisted man or officer from his home and family for a period of seven years, during which period no intelligence of his existence shall have been received.

The case of *Davie v. Briggs* (97 U. S., 628) lays down the rule of law in this class of cases as follows:

The person shown not to have been heard of for seven years by those, if any, who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.

The courts of this country have uniformly held that there is no presumption arising from seven years' absence as to the time of the death. The burden of proving a death at any particular time is upon the person who asserts it. There is no presumption as to the date of death within the seven years. (*Davie v. Briggs*, 97 U. S., 628; *McCartee v. Camel*, 1 Barb., N. Y., ch. 455; *Hancock v. American Life Ins. Co.*, 62 Mo., 26.)

In any case the date of the death may be proved at any time within the seven years as a fact, by direct or circumstantial evidence, such as showing that the person when last seen was in bad health, or was exposed to peril, etc.; but mere unexplained absence short of seven years will not be sufficient to establish death at any time within the period. (See paragraph 41, 1 Greenleaf on Evidence, and cases cited.)

The above is preliminary to showing that in this case the claimant is seeking to establish that the soldier died some time within the seven years provided by statute.

Claim was filed August 13, 1890, and the soldier is shown by the evidence to have been alive October 9, 1883, a period of less than seven years. On the last-named date he signed a communication to

the Pension Bureau asking after the status of his claim, and gave his address as "Peoria, Ill., care lock box 116."

In her declaration the claimant alleged that her husband died in Peoria, Ill., "in 1885." When asked why she gave that date she stated she was so informed by the commander of the G. A. R. post in Peoria. The special examination failed to disclose that the soldier died in Peoria, but it is shown he left that city some time, probably, in 1884, as a letter addressed to him in that year was returned to the Bureau "unclaimed."

The question presented here is whether there is evidence sufficient to fix the date of the soldier's death at any time within the period of his disappearance and the date of filing claim.

On April 5, 1880, the soldier filed a claim for pension in his own behalf and was twice examined thereunder. The last medical certificate was made June 12, 1883, five months before the communication from the soldier, and it is as follows:

Age, 40 years; weight, 160 pounds; height, 5 feet 10 inches; pulse rate, 70; respiration, 18; temperature, 98½. This applicant claims a pension on account of paralysis of right side, producing temporary insanity, also disease of eyes. A very careful examination does not show either of these troubles, nor structural changes, nor rational nor physical signs in support of this claim.

It will be seen that five months before the soldier was last heard from he was in apparent sound physical health. The claimant has shown that the soldier was in an insane asylum in 1877 and that he was in the poorhouse in Peoria County, Ill., until February, 1883, which place he entered in December, 1882. There is nothing to show that he was physically or mentally disabled at that time.

There is absolutely nothing in the case which even tends to establish that the soldier died prior to August 13, 1890, date of filing claim in issue, except that he had not been heard from in a period short of seven years, and had failed to prosecute his claim for pension.

The evidence is not sufficient to establish the death of the soldier, and the facts do not warrant a presumption of death at the date of filing claim.

The claimant insists that as her husband has not been heard from up to the present time, he should be presumed dead. This point can only be decided should another claim be filed. This point is not in issue for consideration under the pending claim.

The action of the Bureau from which appeal was taken is affirmed.

RESTORATION—ACT OF MARCH 3, 1901—WIDOWS.

MARY E. RICE, FORMERLY PAULDING (ALLEGED WIDOW).

It appearing from the official records of the War Department that during the period that this appellant was the wife of the deceased officer, from January 13, 1880, to May 1, 1883, he rendered no military service in any war, but that during the whole of said period his service in the Regular Army of the United States was that of a post surgeon in time of peace, she has no title to restoration, under the provisions of the act of March 3, 1901, of the pension which she formerly received as the widow of said officer.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
January 11, 1902.*

Mary E. Paulding was formerly pensioned under the provisions of section 4702, Revised Statutes, as the widow of Holmes O. Paulding, late a captain and assistant surgeon, United States Army. She continued to receive pension as the widow of said deceased officer to September 9, 1890, when she is shown to have married one Joseph A. Rice, and her pension was terminated by her remarriage in accordance with law.

It appears from the evidence in this case that her second husband, Rice, died on September 16, 1901, and on October 14, 1901, she filed in the Pension Bureau an application under the provisions of the act of March 3, 1901, for restoration of the pension she had previously received as the widow of said deceased officer.

Said application for restoration of pension was rejected on November 16, 1901, upon the ground—

of no title to pension under the act of March 3, 1901, claimant not having been the wife of soldier during the period of his service in any war.

From said action the present appeal was taken on November 30, 1901.

The act of Congress approved March 3, 1901, under which this application for restoration of the pension this appellant formerly received as the widow of the deceased officer is made, is as follows:

The remarriage of any widow, dependent mother, or dependent sister entitled to pension shall not bar her right to such pension to the date of her remarriage, whether an application therefor was filed before or after such marriage; but on the remarriage of any widow, dependent mother, or dependent sister having a pension, such pension shall cease: *Provided, however,* That any widow who was the lawful wife of any officer or enlisted man in the Army, Navy, or Marine Corps of the United States during the period of his service in any war, and whose name was placed or shall hereafter be placed on the pension roll because of her husband's death as the result of wound or injury received or disease contracted in such military service, and whose name has been or shall hereafter be dropped from said pension roll by reason of her marriage to another person who has since died or shall hereafter die, or from whom she has been heretofore or shall be hereafter divorced, upon her own application and without fault on her part, and if she is without means of support other than her daily labor as defined by the acts of June 27, 1890, and May 9, 1900, shall be entitled to have her name again placed on the pension roll at the rate now provided for

widows by the acts of July 14, 1862, March 3, 1873, and March 19, 1886, such pension to commence from the date of the filing of her application in the Pension Bureau after the approval of this act: *And provided further*, That where such widow is already in receipt of a pension from the United States she shall not be entitled to restoration under this act: *And provided further*, That where the pension of said widow on her second or subsequent marriage has accrued to a helpless or idiotic child, or a child or children under the age of 16 years, she shall not be entitled to restoration under this act unless said helpless or idiotic child, or child or children under 16 years of age, be then a member or members of her family and cared for by her, and upon the restoration of said widow the payment of pension to said child or children shall cease.

It will be observed that by the express terms of the foregoing act the widow who is entitled to the restoration of her pension thereunder is one who shall have been the lawful wife of the officer or enlisted man on account of whose service and death said pension was originally granted, "during the period of his service in any war." In the present case it appears from the official records of the War Department that the deceased officer, Holmes O. Paulding, as whose widow this appellant was formerly pensioned, was appointed and commissioned as a first lieutenant and assistant surgeon in the Regular Army of the United States on November 10, 1874, and was commissioned as captain and assistant surgeon, United States Army, November 10, 1879, and that he served therein continuously, as such officer, from the date of his original appointment to the date of his death, which occurred in the service on May 1, 1883. It is shown by the evidence in the case that said deceased officer married this appellant on January 13, 1880, and that she lived with him as his wife from that date up to the date of his death.

The only question, then, to be considered under the terms of said act is whether during the continuance of the marriage between this appellant and said deceased officer, from January, 1880, to May, 1883, said officer served in any war.

It is contended by the appellant that during said period the officer served "in wars with Indians, and that said Indian wars have always been construed and considered as wars, and should be so construed in the adjudication of claims for restoration under the act of March 3, 1901."

The facts in this case relative to the service rendered by the officer in the Regular Army during the period of his marriage to this appellant, as shown by the official records of the War Department, not only render it unnecessary, but preclude the discussion of the abstract question, suggested by the appellant, as to whether the suppression of occasional and sporadic Indian outbreaks and hostilities by the Regular Army of the United States during the period of the deceased officer's service therein could be considered as wars within the meaning and intent of the language used in the act of March 3, 1901, or whether service in the Regular Army under such circumstances could be held to be "service in any war."

Said records show that the deceased officer was on duty as post surgeon at Fort McHenry, Md., from July 15, 1879, to November 4, 1881; as post surgeon at Fort Laramie, Wyo., from November 24, 1881, to April 2, 1883, and as post surgeon at Fort Sidney, Nebr., from April 5, 1883, to May 1, 1883, the date of his death.

It is manifest that during the whole period that this appellant was the wife of the deceased officer he was serving as a post surgeon at various posts and garrisons of the United States Army during a time of general peace, and was not personally engaged in nor rendering any service while hostilities of any character were being conducted.

It is thus apparent that even if the contention of the appellant should be admitted, that the services of the Regular Army in suppressing Indian outbreaks during the time of her deceased husband's service therein could be considered as service in war within the meaning of the language of the act of March 3, 1901, the service shown to have been rendered by the deceased officer during the time that she was his wife was not of this character, and it could not be contended with any reason that his service in garrison as post surgeon was a military service in any war. On the contrary, it is clear from said record that the duties performed and the services rendered by the deceased officer during the whole period that the appellant was his wife were merely those of an army surgeon during a time of peace, and under no circumstances and by no possibility could such services be construed as military "service in any war."

It is manifest, therefore, since the appellant is not shown to have been the wife of the deceased officer "during the period of his service in any war" she is not entitled to a restoration of her pension as the widow of said officer under the provisions of the act of March 3, 1901, and the rejection of her application for restoration for that reason was clearly without error, and is affirmed accordingly.

FRAUD AND MISTAKE—REIMBURSEMENT.

ANNIE COOKE (WIDOW).

The evidence showing that the appellant made a fraudulent application in 1866, upon which pension was allowed and paid, it is immaterial whether such pension was actually received by her or was (as is alleged) appropriated by her attorney. In either event the Government may reimburse itself by withholding current pension due her.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 11, 1902.

Herewith are returned the papers in the appealed pension case of Annie Cooke, widow of Richard Cooke, formerly a soldier in Company C, First United States Colored Infantry.

It appears that the claimant first applied for pension March 23, 1866, as the widow of one William Hayes, who also served as a private in

Company C, First United States Colored Infantry, and died in the service November 5, 1864. That application was allowed and a pension certificate issued July 19, 1866, which was mailed to her attorney, George E. H. Day, of this city. The records of the Treasury Department show that payment of the pension was made in September, 1869, to September 4, 1869.

On July 17, 1900, claimant filed an application for pension under the act of June 27, 1890, as the widow of Richard Cooke, to whom she claimed to have been married in February, 1866. Said application was allowed in August, 1901, as was also a claim for some accrued pension due the deceased soldier, Richard Cooke. It was held, however, that payment of the pension should be withheld until a sufficient amount had accumulated to reimburse the Government for the pension erroneously paid the claimant as the widow of Hayes subsequent to her marriage to Cooke. From that action an appeal was taken October 29, 1901, the claimant's attorney contending that she never received any pension as the widow of Hayes after her marriage to Cooke, but "promptly on that marriage visited the office of one Judge Day, who had been her attorney and in whose office all her vouchers had been witnessed and executed," and that "she surrendered her certificate and voucher to him and informed him of her remarriage."

It is intimated that Day drew the pension himself.

The claimant made an affidavit (filed June 8, 1901) stating that she "never drew a dollar of pension as the widow of Hayes after her marriage to Cooke" and that she "turned in all her papers to Judge Day, her attorney, and told him she had remarried and wanted to surrender the Hayes certificate." She asks that the matter be thoroughly investigated.

It is possible that the claimant never received any pension under the certificate issued to her as the widow of William Hayes, but it is plain that the statement in the appeal, as to her having promptly, on her marriage to Cooke, turned over said certificate with other papers to her attorney, can not be true, for the very good reason that the certificate was not issued until after her marriage to Cooke. In other words, at the time of her marriage to Cooke she had no pension certificate and had never executed any pension vouchers in the office of Judge Day or elsewhere.

It is also evident that, whether she was the actual beneficiary or not, the grant of pension made to her as the widow of William Hayes was procured by a fraud to which she was a party. According to her own statement she was married to Cooke in February, 1866. She applied for pension as the widow of Hayes in March, 1866, and alleged in her application that she had remained his widow ever since his death. The evidence tends to show that she was married to Cooke on December 9, 1865.

The only testimony filed to corroborate her statement that she

received no pension as the widow of Hayes is an affidavit from her brother-in-law, Emanuel Cooke, who states that he lived in the same house with her in Prince George County, Md., in 1866, and knows that she had then ceased to draw pension as the widow of William Hayes, as she did not come to the city to execute any vouchers nor did she execute any at home; and, furthermore, her husband, Richard Cooke, was a minister of the gospel and not a man who would permit his wife to perpetrate a fraud.

It is not contended that she received any pension in 1866. The records show that only one payment was made, and that was in 1869. At that time the law permitted payment to be made to the duly constituted attorney of the person named in the pension certificate. Payment to the attorney was, in effect, payment to the claimant. It is not necessary for the Government to trace the money into the actual possession of the appellant before it can recover from her by withholding current pension, the rule being that principals are liable (civiliter) to third parties for the fraud and deceit of their agents when committed in the course of the principals' business. (1 Am. and Eng. Ency. of Law, 417.) A fortiori where the principal was (as in this case) personally a participant in the fraud, even though she was not a participant in the benefit.

After careful consideration no reason is found for disturbing the action appealed from, and the same is therefore affirmed.

PATHOLOGICAL SEQUENCE—TYPHOID FEVER—BACTERIOLOGY.

CHARLES W. SNOWMAN.

Since the discovery and isolation—by Eberth, in 1880—of the bacillus of typhoid fever, the views of the medical profession, according to Keen and other recent writers, as to the pathology not only of the fever itself, but also of its complications and sequels, recent and remote, have undergone an entire revolution and much is now understood that was formerly inexplicable. The diffusion of this micro-organism is so wide that "scarcely a single tissue or organ of the body escapes invasion by the typhoid bacilli" (Keen). The complications and sequels of typhoid fever are so numerous and so varied that both medical and surgical divisions thereof are now recognized.

"Excepting the laryngeal complications and sequels of typhoid fever, the most frequent are those connected with the bones" (Keen); and modern bacteriology now furnishes a scientific method of demonstrating the existence or non-existence of a pathologic connection between enteric fever and a suspected sequel thereof.

Held: That inasmuch as the appellant in the case at bar contracted typhoid fever in the military service and line of duty, and, subsequent to his muster out from such service, certain suppurative conditions arose—involving the bones and other tissues, especially of the right leg, necessitating the amputation of the right foot—which conditions, it is contended, are sequela of the said fever, further efforts—through thorough special and medical examinations, respectively—should be made to ascertain whether or not, as a matter of fact, the present condition of the soldier was caused by the enteric fever of service origin.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
January 13, 1902.*

Herewith remanded are the papers in the case of Charles W. Snowman, late private Company B, First Maine Infantry, war with Spain, for the purpose of having the same sent to the field with a view to the adduction of more satisfactory evidence in regard to certain points in the claim that seem of more or less vital importance to the interests of the claimant.

The soldier enlisted in the above-mentioned organization May 2, 1898, and was mustered out with his company October 27, 1898.

The record in the case shows that he was treated in Maine General Hospital, Portland, Me., from August 26, 1898, to October 9, 1898, for typhoid fever. He was admitted to the said hospital from a hospital train from Chickamauga, Ga., at which latter place he was treated for acute diarrhea from August 14 to 21, 1898.

On May 24, 1900, he filed a claim for pension wherein he alleged that he contracted malarial typhoid fever at Chickamauga, Ga., in August, 1898. No especial sequence of said fever, as a cause of disability, was alleged in such claim. In an affidavit filed September 25, 1900, he alleged that for over a year and a half he had suffered from a malarial sore on his right foot, and that for some time he had been obliged to use crutches. In an affidavit filed January 14, 1901, he alleged that shortly after leaving the Maine General Hospital, where he had been treated for malarial typhoid fever for six weeks, a sore appeared on his ankle, which sore, he had been informed by physicians, was caused by the fever which he had in the service; that the ankle grew rapidly worse, making it necessary to have it operated on and resulted in his having to have his leg amputated just above the ankle.

One of the physicians by whom the soldier was treated subsequent to his discharge from the service, Dr. Alfred King, of Portland, Me., testified in an affidavit filed April 26, 1901, in regard to two different operations—one an amputation—that he performed upon the claimant's right leg and ankle. He says: That he was first called to see the soldier September 8, 1900, when he found him suffering from some suppurating sinuses running beneath the skin and tendons about the right ankle joint, which were treated until September 18, 1900, when he etherized the soldier, laid open the sinuses, and curetted and sterilized the same, as well as possible; that, at that time, there was no communication between the sinuses and the ankle joint; that the parts improved for a time, and then the right ankle joint became involved—the disease becoming so extensive and the general health of the soldier so much impaired that amputation at the lower third of the right leg became necessary in order to save his life; that at the time of the amputation there was some inflammation about the upper tibio-fibular articulation, which later went on to suppuration; that other

pyæmic abscesses appeared in the skin of the right groin, over the seventh rib on the left side and on the back of the right hand; that slight inflammatory changes appeared at the costo-sternal articulations; that his temperature was generally about 101.5, with gradual loss of flesh and strength; and that, in affiant's opinion, the said conditions were due to the pyæmic effects of the typho-malarial fever contracted at Chickamauga.

Another physician by whom the soldier was treated at different times, Dr. B. B. Foster, of Portland, Me., testified in an affidavit filed March 5, 1901, that he had known him since boyhood, and knew, as a physician, that his physical condition was perfect prior to his enlistment in the Army; that he saw him at the Maine General Hospital soon after he was brought home from Chickamauga, suffering with typhoid fever in a very severe form; that after leaving the hospital the soldier came under my (the affiant's) observation, on the second day of October, 1899, suffering with an ulcer of the leg near the ankle; that his general condition was rather poor; that he continued under affiant's treatment until May 10, 1900, at which time he was still suffering with an ulcer of the leg and a rather debilitated condition.

Still another physician by whom the soldier was treated—but for a few months only—testified in an affidavit filed March 2, 1901, that he first treated the claimant for the diseased ankle on May 26, 1900; that he prescribed for him four other times—until August 14, 1900, when he passed to the care of another physician; that he was at that time somewhat weakened by the diseased ankle, but was able to do some work; that in affiant's opinion “the inflammation of the bones of the right ankle was undoubtedly of a tubercular nature.”

The claimant was examined by a board of examining surgeons October 17, 1900; but the conditions described in the certificate of such examination were more subjective than objective. Relative to the disease of the soldier's right leg, the board described one operation that had been performed thereon—as related, in all probability, by the claimant. It was also stated, however, that the wounds were in a process of healing, and a rating of 6'18 was recommended for “malarial sore of right foot.” But no other evidence of malarial poisoning was found, according to the said report.

The claim in question was rejected June 4, 1901, on the ground that no disability from either typhoid or malarial fever had been shown since the date of filing the same, and that the sore on right foot and resulting loss of right foot could not be accepted as a result of typhoid or malarial fever.

In consequence of the rejection of his said claim the soldier filed additional medical evidence with a view to having the case reopened and further considered, but the Bureau held that such action was not warranted, as the said evidence did not connect the diseased condition

of the right foot with the typhoid fever for which the soldier was treated while on furlough.

The additional evidence referred to follows.

Dr. Charles D. Smith, a member of the staff of the Maine General Hospital testified, in an affidavit filed August 12, 1901:

That he is a practicing physician, and that he has been acquainted with said soldier for about three years, and that said Charles W. Snowman was admitted to the Maine General Hospital, Portland, ward G, August 26, 1898. He was taken from hospital train bringing a part of First Maine Volunteers from Chickamauga.

At time of admission patient had noon temperature of 103°, abundant crop of rose spots, stupor, mild delirium, profuse diarrhea of pea-soup appearance. The Widal test was positive. Patient gave later history of a week's sickness with diarrhea at Chickamauga, but did not enter hospital; grew worse on train. The temperature curve showed fever of the second week. The case went on as a typical typhoid of considerable severity; collapse threatened several times early. Blood examination showed absence of malarial plasmodium. Patient discharged convalescent October 9, 1898. This was by insistence of family and against my advice.

I have had no knowledge of him or his condition since that date.

Dr. H. S. Emery, who had previously testified in the case, said:

I first treated Charles W. Snowman May 26, 1900, for ulcers of right ankle, and three following times, until August 11, 1900. In my affidavit of date February 21, 1901, I stated that, in my opinion, the ulcers were due to tubercular infection, but from facts learned from Dr. Alfred King, who has since treated the case, I think the diseased condition of the ankle was due to an infection caused by the typhomalarial fever. On account of the brief time that said Snowman was under my care it was difficult to make a definite diagnosis, and, moreover, characteristic symptoms had not then appeared.

Subsequent to the said second adverse action of the Bureau in the premises additional affidavits of Drs. King and Foster were filed.

Dr. Foster testified as follows:

I have known Mr. Charles W. Snowman from his early childhood up to the present time. I have been his father's physician a greater part of the time for the last fifteen years, and have had an opportunity of observing Charles W. Snowman during this time. I am prepared to state that up to the time of his joining the First Maine Infantry and going with them to Chickamauga he was well and strong. While away with his regiment he was taken sick with typhomalarial fever, and on his arrival home was removed from the train to the Maine General Hospital, where he was very sick. Soon after leaving the hospital he developed a small abscess on his ankle, which I believe was due to the debilitated condition produced by his fever. I had an opportunity of observing the sore for some time, during which time it increased in severity, and I am informed that since my last seeing him the foot has been removed. In my opinion Mr. Charles W. Snowman's present condition was caused by disease contracted while in service of the United States.

The testimony of Dr. King is of more importance than is that of any other physician who has testified in the case, as it was he who performed the aforesaid operations upon the soldier's right leg, and his statement in his most recent affidavit in regard to the bacteriological examination which he says was made of the tissues involved in the suppurative processes, referred to by each affiant in the case, offers the

only logical method of establishing the alleged relation of cause and effect between the typhoid fever, shown to have been contracted in the service and line of duty, and the disease of right leg and other parts that were affected by such processes subsequent to the claimant's discharge from the service.

Dr. King's affidavit was executed December 28, 1901, and he testified therein as follows:

That he is a practicing physician and has been acquainted with the above-named soldier about one year and three months, and that when he first saw said Charles W. Snowman, September 8, 1900, he was suffering from suppurating sinuses about right ankle joint. Two operations were necessary, the second one to save the life of the patient. This was an amputation of lower third of right leg. Disease then affected the superior tibia-fibular articulations of the right leg, the skin in right groin, the eighth and ninth ribs on left side, the upper third of sternum, the left claviculo-acromial joint, the third metacarpal bone of right hand, the carpo-metacarpal bones of left hand, with left wrist joint, and, finally, both lungs. This disease was thought to be pyemic, but now, from bacteriological examination, is a mixed tubercular infection. During my care of said Charles W. Snowman he has been totally disabled. Emaciation and failure of strength have steadily proceeded, until he is hardly able to sit up. He can not live but a very few weeks at best.

In view of his excellent health previous to enlistment, and excellent family history, and of the diseased condition following immediately on the septic typhoid fever, I am of the opinion that his disease was acquired in the service, or on account of the severe impairment of health and nutrition due to the typhoid fever, and that this diseased condition and impaired nutrition will cause his death in a very short time.

As heretofore stated, Dr. King refers to the only method by which any connection between the condition of the soldier, as described by himself and the other physicians who have testified in the case, and the typhoid fever which he contracted while in the service can be satisfactorily established, i. e., through a careful, thorough, and scientific bacteriological examination of the tissues involved in the morbid conditions described by the said affiants, and of the blood as well.

In view of the fact that these said conditions followed so soon after the attack of typhoid fever, a logical deduction might reasonably be drawn that such conditions were sequelæ of the enteric fever, but such connection could only be demonstrated in the manner referred to above.

It is not quite clear whether the Bureau meant to hold by the afore-said adverse action of June 4, 1901, that the then existing condition of the soldier could not have been caused by typhoid fever, but if such is the case it must be held that its position in the premises is untenable, as there is ample authority for holding the contrary.

Although few diseases are so widespread as typhoid fever and concerning which there is such a vast amount of literature, it is, nevertheless, a much to be regretted fact that such important subjects as the medical and surgical complications and sequelæ of enteric fever are but briefly touched upon in the various systems of medicine and text or reference books. This fact makes all the more valuable and

interesting as well as instructive a recent (1898) monograph, entitled *The Surgical Complications and Sequels of Typhoid Fever*, by William W. Keen, M. D., LL. D., professor of the principles of surgery and of clinical surgery, Jefferson Medical College, Philadelphia, Pa., the said book having been based upon tables of 1,700 cases compiled by the author and by Thompson S. Westcott, M. D., instructor in diseases of children, University of Pennsylvania.

In the revised edition (1900) of Tyson's *Practice of Medicine* the subject in question and also the disease which the claimant alleges that he contracted in the service, i. e., "malarial typhoid fever," are referred to as follows:

The recent Spanish-American war has confirmed the possibility of the coexistence of typhoid fever and of malarial fever, since a number of cases from among the soldiers have been reported in which not only all the necessary clinical features of typhoid fever were present, but also the Widal reaction, in which, too, the malarial organism was found in the blood. Such coexistence occurred in two of the cases under my own care in the hospital of the University of Pennsylvania. It is, however, an infrequent event. On the other hand, a disease that is the product of the two causes, as was once supposed to be the case, and known as typho-malarial fever, does not exist. The term should be dropped, as it is confusing and gives rise to erroneous impressions.

Persons with tuberculosis, epilepsy, and other forms of chronic nervous disease are as liable to typhoid fever as others, while measles, chicken-pox, and especially erysipelas, may befall a typhoid case. Typhoid fever itself predisposes to tuberculosis, and not a few patients recover from the former disease only to be attacked by the latter.

Post-typhoid bone lesions are surprisingly common when investigated. Sir James Paget, Murchison, W. W. Keen, Haywood, Harold C. Parsons, and others, have collected many cases. They include osteitis, necrosis, and periostitis. The tibia is the favorite seat—91 times out of 216 of Keen's collection—then the ribs 40 times, the femur 22 times, the ulna 15, and the humerus 11. Ebermaier, in 1887, obtained from two cases of suppurative post-typhoid periostitis the bacillus of Eberth in pure culture, and since then quite a number of cases have been reported, whence pyogenic properties of this bacillus may be inferred. Other bacilli, viz., the staphylococcus, streptococcus, and pneumococcus, are, however, at times associated. Golgi also produced suppuration by injecting pure typhoid bacilli subcutaneously at a distance from the fractured ends of a long bone in a lower animal. The pus showed in culture only typhoid bacilli. * * * Necrosis of the cartilages, as well as ulcers, are frequent results. All of these surgical complications are easily explained since the recognition of the bacillus.

In the latest edition (1898) of his *Principles and Practice of Medicine*, Osler, one of the leading medical authors of America, accords much greater consideration to the subject herein discussed—i. e., the sequelæ of typhoid fever—than had been accorded in the earlier editions of his said book. Relative to the post-typhoid lesions of the osseous system he says:

Among the most common and troublesome of the sequelæ of the disease are the bone lesions. Of 237 cases collected by Keen there was periostitis in 110, necrosis in 85, and caries in 13. They are, I am sure, much more frequent than the figures indicate. Six cases came under my notice in the course of a year and formed the

basis of Parson's paper (Studies II). The legs are chiefly involved. In Keen's series the tibia was affected in 91 cases, the ribs in 40. The majority occur after convalescence is established. Of 51 cases in which bacteriological examinations were made, in 13 pyogenic bacteria were found; in 38 there were typhoid bacilli (Keen). The typhoid bone lesion is apt to form what the old writers called cold abscess. Only a few of the cases are acute. Chronicity, indolence, and a remarkable tendency to recurrence are, perhaps, the three most striking features of the typhoid bone lesions. If not thoroughly treated sinuses may remain, and typhoid bacilli have been found in these old lesions for as long as seven or more years.

As will be observed, both Tyson and Osler accord full credit to Keen for his investigations and for his valuable contribution to the literature of this subject.

In speaking of the pathology of the surgical complications and sequelæ of typhoid fever, in his aforesaid monograph, Keen says, in part:

The surgical results of scarlet fever and the other exanthemata have long been recognized and described. But up to 1876, when I published my Toner Lecture, surgical troubles after typhoid and other continued fevers were deemed rather among the curiosities of literature, then looked upon as somewhat rare, but yet well ascertained surgical post-febrile lesions, which should be expected from time to time and, therefore, watched for and, if possible, prevented. Since 1880, when Eberth discovered the bacillus of typhoid fever, our views of the pathology not only of the fever itself, but also of its complications and sequels, recent and remote, have undergone an entire revolution and we now understand much that was formerly inexplicable.

I shall only consider the pathology of typhoid sufficiently for us to see its bearing from the surgical side; more than that would be out of place. The pathology of typhus fever is so much less clear and certain, and the number of cases, after typhus so much smaller, especially at the present time, that I shall entirely omit its special consideration.

In order to gain a clear idea of the pathology of typhoid and post-typhoid lesions, I will consider:

1. The viability of the typhoid bacilli both in and out of the body; and, therefore, the possibility of their causing late as well as early sequels of the fever.
2. Their wide diffusion in the various organs of the human body, and therefore the possibility, if not the probability, that all the various surgical results may be caused by them.
3. Mixed infections of the typhoid bacilli with other bacteria.
4. The pyogenic faculty of the typhoid bacilli.
5. Typhoid infection of different organs without typical typhoid lesions in the intestine.

Relative to the viability (ability to live) of the typhoid bacilli, this author says:

The viability of the typhoid bacilli (*a*) outside the human body: In favorable conditions, e. g. in a bacteriological laboratory, the typhoid germs may live indefinitely; but in unfavorable conditions, also, their viability is remarkable. Thus Loëner found that the bacillus only disappeared from the body ninety-six days after burial. In feces they may live even for months. Remlinger and Schneider have found them in the feces of five out of ten patients who had never had typhoid fever.

Schiller impregnated threads with the bacillus and found them still active in periods of from one to two years.

Uffelmann found them still living and active after eighty-two days in dry sterile sand.

(b) Their viability inside the human body: I will not mention instances, of which there are a large number, in which the typhoid bacilli have been found in abscesses, etc., within three or four weeks after the fever, but only those cases in which they have been found months and even years afterwards.

By far the longest time after the fever when the typhoid bacillus has been found, and in pure culture, is that of Von Dungern. Fourteen years and a half after the fever the bacillus was found in an abscess about the gall-bladder.

A number of cases were cited as having been recorded by various observers—in some of which the post-typhoid lesion was manifested several months after convalescence, and in others from two or three to six or seven years after disappearance of the fever.

As to the "wide diffusion of the bacilli in the various organs and tissues of the body," it is said:

Scarcely a single tissue or organ of the body escapes invasion by the typhoid bacilli. Not only the normal tissues are invaded, but, as is seen by the preceding section and in many later chapters, they are found in the pus of abscesses in every region of the body and in empyema, in the effusion of teno-synovitis, in the nonpurulent fluid of orchitis, etc.

Relative to the mixed infection of the typhoid bacillus and the pyogenic and other bacteria it is stated:

Very rarely specific infections, such as those of tetanus, erysipelas, anthrax, and malignant edema, occur in cases of typhoid fever.

And as to the pyogenic (pus producing) faculty of the typhoid bacilli, the author says:

The proof of this lies, first, in observed cases in man in which the typhoid bacilli have been found in pure culture and, secondly, in experiments upon animals. The first to observe this pyogenic property of the typhoid bacilli were Rendu, Fraenkel, and Tavel.

In speaking of "typhoid affections of the bones," Keen says:

Excepting the laryngeal complications and sequels of typhoid fever, the most frequent are those connected with the bones.

And as to its pathology, he says, in part:

The causes to which twenty years ago I attributed the necrosis of bone, which was at that time by far the most frequently recorded sequel among the bone lesions (50 out of 69 cases) were two: First, thrombosis, or, in some cases, embolism; and, secondly, absolute inanition, or want of nutrition. But modern bacteriology, which did not exist in 1876, has rendered these views almost entirely untenable, and gives the first and by far the most important place to the typhoid bacillus.

It is doubtful whether inanition plays any rôle whatever in producing any of the typhoid diseases of bone, though it is possible that in a patient whose nutrition was at a very low ebb it might lead to necrosis, especially if any injury were inflicted on a subcutaneous bone. The poor nourishment of the bone would be a predisposing, and the injury the exciting, cause of the necrosis.

This phase of the question is further discussed at considerable length and with much detail by the author, but can only be referred to thus

briefly herein. It is interesting to note, however, that he expresses the opinion that:

Bone disease is, therefore, rarely a complication of typhoid, but is, in the vast majority of cases, a sequel. It rarely arises during the course of the fever (the earliest case arose on the tenth day), but almost always in convalescence and, in fact, in over one-half the cases after convalescence was well established. It is at this time that muscular strain begins by the patient's commencing to stand and walk, and later by his return to ordinary manual labor; it is then that blows and other usual slight accidents may occur; it is then that the slow changes in the bones begin to show themselves; it is then that the bacilli, driven, so to speak, from other parts of the system, take refuge in the bones, and lie in wait, ready to avail themselves of any unfavorable conditions of fluctuating health or varying circulation, or of anything causing a *locus minoris resistentiæ*.

In view of the facts above set forth it would seem that this claim for pension was scarcely in shape for final adjudication at the time the action appealed from was taken; for, in the light of our present information in regard to the pathology of typhoid fever, such claim was not based upon a mere theory, but had for its foundation actual conditions that were susceptible of scientific demonstration. To hold, therefore, that the said conditions could not be accepted as pathologic sequelæ of typhoid fever without first ascertaining, as could have been done, whether or not, as a matter of fact, they actually were, was clearly error.

In an appeal from the said adverse actions of the Bureau in the premises, filed December 21, 1901, it is contended that the claimant contracted typhoid-malarial fever at Chickamauga, Ga., and was sent, with others, to Maine general hospital, from which he was discharged against the wishes of the surgeon in charge; that after he got home, but before he was discharged from the service, a pain commenced in his right ankle, which developed into an ulcer and became so extensive that, in order to save his life, the foot was amputated, and that since that time other ulcers or sores have developed in other parts of his body.

The record and evidence in the case fails to sustain the contention that ulcers or sores developed upon the soldier's right leg, ankle, or foot prior to his discharge from the service or soon thereafter; but, in view of the fact, as shown by the authorities herein cited, that such conditions as are described in this case are seldom complications of typhoid fever, but are nearly always sequels thereof, and may develop months, or even years, after recovery from the original attack of fever, it is of no importance to show that the said conditions existed in the service in order to establish their alleged relation to the enteric fever. Furthermore, if the conditions referred to had existed in the service it would be unnecessary to seek to establish the same as a sequel of any other cause of disability, and a claim for pension on account thereof could be prosecuted on the ground that such conditions and results

thereof constituted a separate and distinct cause of disability of service origin.

At the time this claim was adjudicated the facts presented in the case showed that the soldier had been treated for typhoid fever. He alleged that the said fever was "malarial-typhoid"—meaning, however, what has been recognized and termed by the medical profession as "typho-malarial fever," which term Tyson now contends is a misnomer—"does not exist"—and should be abandoned for the reason that "it is confusing and gives rise to erroneous impressions." This author admits the possibility of the coexistence of typhoid and malarial fevers in the same subject, but holds that not only all the necessary clinical features of enteric fever will be present, but also the Widal reaction, in which, too, the malarial organism will be found.

In this connection he also says, as before stated:

Persons with tuberculosis, epilepsy, and other forms of chronic nervous disease, are as liable to typhoid fever as others, while measles, chicken pox, and especially erysipelas, may befall a typhoid case. Typhoid fever itself predisposes to tuberculosis, and not a few patients recover from the former disease only to be attacked by the latter.

In this case the question as to the coexistence of malarial fever with the typhoid fever of record may be eliminated, as it is shown by the testimony of Charles D. Smith that a "blood examination (while the soldier was in the hospital) showed absence of malarial plasmodium." The elimination of malarial fever, however, does not affect the status of the case, as the conditions shown to have arisen subsequent to the soldier's discharge are not regarded as either probable or possible sequels of malarial fever, but are considered as susceptible of demonstration as sequelæ of typhoid fever.

And it is with a view to affording the appellant full opportunity to demonstrate, if he can, the alleged connection between the typhoid fever of service origin and the conditions that arose subsequent to his discharge that the Department has determined to have a special examination held in the case.

Sufficient has been said herein, it is thought, to show the lines along which the special examination should be conducted.

The main point to be ascertained, however, is the question as to whether or not the bacteriological examination referred to by Dr. King in his most recent affidavit in the case revealed the presence of the bacillus of Eberth—the bacilli of typhoid fever—either in pure culture or in mixed infection with other bacteria.

If any subsequent bacteriological examinations have been made of the tissues involved in the suppurative processes referred to by Dr. King, the results of such examinations should be ascertained. Dr. King testified in his aforesaid most recent affidavit that a "mixed tubercular infection" was found at the examination to which he referred, as

before said. He should be asked to state whether, in his opinion, the disease of the appellant's osseous system—relative to which he has heretofore testified—is due to a general tubercular infection following upon the attack of typhoid fever, or whether it is a post-typhoid lesion due to the bacilli of typhoid fever, or a mixed infection due to the micro-organisms of tuberculosis and typhoid fever, respectively.

Dr. King should also be requested to give the exact date of the amputation of the soldier's right foot which he performed, and to state the exact line of section as well.

Although the claimant's right foot had been amputated at the date of the rejection of his said claim, no effort appears to have been made to ascertain the date of the operation, and no medical examination was ordered with a view to ascertaining the exact point of amputation. These points were ignored, presumably, because the Bureau did not suppose that the amputation, or the conditions that necessitated it, could be traced in any way to the soldier's military service.

Dr. King having testified that the appellant is dangerously ill, with probably but a short time to live, an examining surgeon should be directed to proceed to his house, examine the stump of his right leg and report the condition and length of the same, thus showing the line of amputation.

Another point which the special examiner should inquire into is the fact that the soldier signed a declaration, when he was mustered out of the service, to the effect that he had no reason to believe at that time that he was suffering from the effects of any wound, injury, or disease, or from any disability or impairment of health, whether incurred in the military service or otherwise.

It is noted, however, that in reply to the printed question in the said declaration, "When was the disability incurred?" the answer, "About August 15, 1896," is recorded; and opposite the question, "Where was the disability incurred?" is the answer, "Camp George H. Thomas."

This declaration is certified to by the captain of the claimant's company and by the assistant surgeon of the regiment, but the soldier's statement is not in his own handwriting, and is written in different colored ink from his signature.

His alleged declaration that he was suffering from no cause of disability, and his recorded statement that he incurred some disability at Camp Thomas (Chickamauga) in August, 1896, are contradictory and should be explained. Furthermore, he was not at Chickamauga in August, 1896, but was there in August, 1898, when he contracted typhoid fever; and it seems hardly probable that a person barely convalescent from a very severe attack of such fever would or could, with truth, declare that he was free from all disability. But in a question of the character involved in this case such declarations of soldiers

and certificates of their captains and the surgeons of their regiments, respectively, would be of no effect in determining such question, as the soldier might think in good faith that he had fully recovered from all the ill effects or dangers of typhoid fever, and no objective signs or symptoms of any sequelæ of such disease might be found upon examination by the surgeon, yet the bacilli of the disease might still be lurking in his system and lie dormant until a favorable opportunity for some manifestation of the presence thereof should arise.

As before stated, the appellant is reported by his attending physician to be seriously and dangerously ill. It is, therefore, directed that the papers in the case shall be forwarded without delay to a special examiner, who should be instructed to take up the case at once and complete his examination as soon as possible.

As soon as the report of such examination shall be received at the Bureau all of the papers in the case, together with such statement as the Bureau may deem proper in the premises, will be transmitted to the Department for final disposition of the pending appeal.

DEPENDENT PARENTS—EVIDENCE—INCOME.

MARGARET BURKE (MOTHER).

A mother claimant who occupies her own house and has an income of \$20 per month from rents and receives over \$500 per year, the earnings of her husband, is not dependent within the meaning of section 4707 of the Revised Statutes.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 13, 1902.

Margaret Burke, as mother of John Burke, formerly private in Company G, Eighth Ohio Volunteer Infantry, war with Spain, filed claim for pension under section 4707, Revised Statutes, March 8, 1900, which was rejected October 29, 1901, in the following stated language:

Approval for rejection; claimant has property which furnishes a home and a monthly rental of some twenty-five or thirty dollars, and her husband earns \$600 per year in addition. Other points not considered.

December 26, 1901, a letter from claimant was filed as an appeal to the Department, in which she contended that the Bureau was in error in its consideration of the evidence in the case.

It is to be noted that this appeal raises the simple question whether claimant was dependent within the meaning of the law at the date of the death of the soldier.

The soldier, who had a claim pending, died January 29, 1900.

The evidence in the case shows that claimant is the owner, in her own right, of one acre and sixty-seven one-hundredths of an acre of ground in the town of Barberton, Summit County, Ohio, on which

are located four houses, in one of which the claimant lives with her family. The statements of real estate agents are to the effect that this property is fairly worth from \$2,500 to \$3,000. The claimant testified that the house she occupied with her family contained six rooms, and that one of the other houses had three rooms and was rented at \$8 per month, and the other was an eight-room house and was rented about one-half the time at \$15 per month. It will be seen that the claimant has an income of at least \$20 per month from rents, taking her own statement for it. Then, again, it is shown by the evidence that the houses, excepting the three-room house, are insured for \$2,200. There is an incumbrance on the whole property of \$700, paying 6 per cent interest. Claimant's husband is alive and, according to his own testimony he has worked almost continuously as gate watchman for a boiler works, and now receives \$1.65 per day, and at the date of the death of the soldier he received \$1.45 a day, working seven days in the week. His income from his labor at that date was \$529 per year. The net income of claimant, including that of her husband, who is legally bound to support her, and deducting interest on the mortgage and the taxes, is in excess of \$700, according to her own statement, and those of her husband. She occupies a house of her own, thus paying no rent for that purpose. The value put upon her property by claimant is \$1,200, but in this she is contradicted by the evidence of competent witnesses and by the value of \$2,200 placed by her with the insurance companies on three of the houses.

Section 4707, Revised Statutes, is as follows:

If any person embraced within the provisions of sections forty-six hundred and ninety-two and forty-six hundred and ninety-three has died since the fourth day of March, eighteen hundred and sixty-one, or shall hereafter die, by reason of any wound, injury, casualty, or disease, which, under the conditions and limitations of such sections, would have entitled him to an invalid pension, and has not left or shall not leave a widow or legitimate child, but has left or shall leave other relative or relatives who were dependent upon him for support in whole or in part at the date of his death, such relative or relatives shall be entitled, in the following order of precedence, to receive the same pension as such person would have been entitled to had he been totally disabled, to commence from the death of such person, namely: First, the mother; secondly, the father; thirdly, orphan brothers and sisters under sixteen years of age, who shall be pensioned jointly: * * * *Provided*, That a mother shall be assumed to have been dependent upon her son within the meaning of this section if, at the date of his death, she had no other adequate means of support than the ordinary proceeds of her own manual labor and the contributions of said son or of any other persons not legally bound to aid in her support; and if, by actual contributions, or in any other way, the son had recognized his obligations to aid in support of his mother, or was by law bound to such support, and that a father or a minor brother or sister shall, in like manner and under like conditions, be assumed to have been dependent, except that the income which was derived or derivable from his actual or possible manual labor shall be taken into account in estimating a father's means of independent support: *Provided, further*, That the pension allowed to any person on account of his or her dependence, as hereinbefore provided, shall not be paid for any period during which it shall not be necessary as a means of adequate subsistence.

In the case of Stephen F. Williams (7 P. D., 507), the following language is used in construing the above section:

This section clearly defines dependence, and it is unnecessary to look elsewhere for a definition. As applied to the mother, father, orphan brother, or sister of the soldier under 16 years of age, "dependence" is defined in the act to be, first, lack of adequate means of support; and in the case of a mother, brother, and sister, in determining the question as to whether there was or was not a lack of adequate means of support, the ordinary proceeds of their manual labor and contributions of those not legally bound to aid in their support should not be taken into account; second, lack of means of independent support; and in case of the father, his actual or possible income from his manual labor shall be taken into account in determining the question whether he lacked means of adequate support; third, lack of "adequate subsistence."

There is **nothing** in the evidence in this case to show that the amount received by claimant is **not an adequate** means of subsistence.

In the case of Ann Tobin (6 P. D., o. s., 362), it was held:

Where at date of claimant's son's death her husband was constantly employed at the maximum wages paid workmen of the class of workmen to which he belonged she is not deemed dependent on her son for support within the meaning of the pension laws.

In the case of the mother of Charles R. Prescott (12 P. D., o. s., 477), it was said:

This claimant's income at the date of her son's death being \$315 per year, it is held it was adequate to her support in that condition of life in which she was then living.

It is clear that a mother who occupies her own house and has an income of \$20 per month from rents and receives over \$500 per year from the earnings of her husband, as this claimant does, is not "dependent" within the meaning of the law.

The action of the Bureau from which appeal was taken is affirmed.

DEPENDENT RELATIVES—SLAVE MOTHERS.

HARRIET GRAY (MOTHER).

Claimant and her minor son were slaves when said son abandoned his master and mother in 1863, and enlisted two years thereafter, never having in any manner contributed to his said mother's support.

Held, that as claimant's said son, the soldier, never contributed to her support, and was not legally bound so to do, she was not dependent upon him for support at the date of his death, and not pensionable as a dependent mother.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
January 15, 1902.*

Harriet, as alleged dependent mother of Harvey, alias Abner, Gray, formerly a private in Company F, Eighty-eighth United States Colored Volunteer Infantry, and now a pensioner under the act of June 27, 1890, filed her application for pension under the general law on May 8,

1882, which claim was rejected on June 17, 1901, on the ground that claimant was not dependent upon soldier at the date of his death; that he was not living with her at date of enlistment, but had abandoned his home and her for two years before he enlisted. An appeal was filed on December 18, 1901.

The undisputed facts in this case are as follows:

Soldier, when perhaps 15 years of age, and while he and his mother were in a state of slavery, left his home as early as the year 1863. His whereabouts for some little time were unknown to claimant. He did not communicate with her in any manner whatsoever, manifested no interest in her, and enlisted on February 15, 1865, dying in the service on September 4, 1865, his mother being unaware of his whereabouts until a short time before his decease, and not knowing of his death until some weeks after it occurred. It is not contended that the soldier contributed in any way toward the support of claimant, but the appeal is based upon a purported decision by Secretary Teller (P. D., o. s., 12) to the effect that—

The soldier being a minor up to the date of enlistment, and to the date of his death, the parent would be entitled to his services if he were living, and therefore to a pension if he were dead.

The above quotation is not the exact wording of the opinion, but is somewhat broader in its meaning than the language actually used would warrant; and the opinion referred to was not decisive of any given case, but was rendered at the request of the Commissioner of Pensions regarding what was necessary to be proved in the case of a dependent mother claiming by reason of the death of her minor son, an enlisted man. The variance is not of any special moment, however, as it will be shown that the doctrine announced by said opinion is not applicable to the case at bar.

It is without doubt a general principle of law regarding the domestic relations that a father has the right to the custody, control, and services of his minor son. Such a right, however, is not a dry, technical right, carrying no provisions or conditions with it, but arises only under a certain state of facts. Blackstone says, in the first volume of his Commentaries, page 453, that the father has the benefit of the labor of his children while they live with him and are maintained by him, and that such right rests upon the parental duty of maintenance, thus furnishing some compensation to the father for the services rendered by him to such children. This is also the conclusion of Chancellor Kent, as shown on page 93 of the second volume of his Commentaries. Schouler says, in his work on Domestic Relation, section 252a:

The duties and rights of parents are limited, mutually dependent, and in a great degree correspondent with one another. When the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, our

courts are reluctant to admit his right to the child's services. Under such circumstances, says a New Hampshire court, "there is no principle but that of slavery which continues his right to receive the earnings of his child's labor."

A long line of decisions might be cited as upholding the doctrine that the parent's right to the services and earnings of a minor child are based upon the duty of maintenance. When, however, the parent does not maintain the child, but, on the contrary, permits him to use his time as his own, taking no interest in his welfare, providing no home for him, and allowing him to go his own way unmolested and uncared for by such parent, such a procedure amounts, in law, to an emancipation of the child. Emancipation may take place just as legally by the conduct of the parent in permitting the child to use his time as though he were emancipated, as it might by an express agreement in writing. (See cases cited under note 2, page 396, *American Cyclopaedia of Law*, volume 17.) Mr. Schouler says:

It is a well-settled rule in this country that if the parent absconds, turns his child out of doors, or leaves him to shift for himself, the son is entitled to his own wages; and our courts are very liberal in allowing children to avail themselves of any breach of parental obligation, so as to earn an honest livelihood by their own toil. The presumption raised in such cases may be termed a presumption of necessity.

(Schouler, *Dom. Rel.*, sec. 267a.)

The soldier left his home during his minority and at the time when his mother had no legal claim upon him or his wages, for when he left her both she and he were in a state of slavery. (See case of *Ruth Jones*, 3 P. D., 279.) The soldier's time belonged to his master and not to his mother. When he enlisted in the military service, however, even if his mother had a right to his services, such enlistment completely changed the legal obligations. It has been held by the supreme courts of many of the States, as well as by some of the inferior United States courts, that an enlistment in the Army or Navy of the United States makes the enlistment contract a personal one, and that the pay, bounty, and prize money, though earned under State laws, are the personal property of the minor and can not be reached by the parent. Such is the holding of the appellate courts of Pennsylvania, New York, Maine, Illinois, Massachusetts, and West Virginia.

All that has been said in reference to legal holdings relates to the rights of the father, but it is extremely doubtful if, even on the death of the father, the right to the earnings of a minor child would pass to the mother. (See Schouler on *Dom. Rel.*, sec. 254.)

While the principle announced by Secretary Teller in the case cited is true as a general proposition, yet the foregoing shows that the facts and circumstances as evidenced in any particular case must be the guide in applying the law. In the case at bar the legal right to the minor soldier's services and earnings was absolutely wanting. It was cut off, in any event, by the minor's enlistment, and he died during

the continuation of his enlistment contract. It is plainly apparent that even under the general proposition laid down by Secretary Teller the within claimant's case is without merit.

This appeal, as stated, rests upon a strict legal proposition, and the case should not be confounded with that class of cases wherein a soldier, minor, voluntarily contributed to the support of his parents, thus bringing them within the statute.

The Department finds, as a fact, that the soldier did not in any manner contribute to the support of claimant. It finds, as a matter of law, that he was under no legal obligation to contribute to her support, and that she was not, in contemplation of the statute, dependent upon him for support at the time of his death.

Action affirmed.

MARRIAGE AND DIVORCE—IMPEDIMENT—EVIDENCE.

CAROLINE WAGNER (ALLEGED WIDOW).

It appearing from the evidence in this case that at the date of the marriage of this appellant to the deceased soldier he had another lawful wife living and undivorced, her marriage to him was illegal and void under the laws of the State of New York, where it was consummated and where the parties resided; and since it also appears that the appellant had no knowledge of the existence of the impediment to her lawful marriage with the soldier until after his death, and no change in the relationship sustained by said parties to each other is shown after the removal of the impediment to their lawful union by the death of the first wife, no legal marriage is established between the appellant and the soldier, and she is not his pensionable widow.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
January 15, 1902.*

Caroline Wagner filed in the Pension Bureau on June 3, 1896, an application for pension under the provisions of the third section of the act of June 27, 1890, as widow of Daniel Wagner, late a private in Company D, One hundred and twenty-third New York Volunteer Infantry, alleging the death of said soldier on May 13, 1895, leaving her as his widow surviving, without other means of support than her daily labor.

Said application for widow's pension was rejected on March 3, 1900, upon the ground that the claimant was not the lawful widow of the deceased soldier, it being shown by the evidence that at the date of her marriage to him he had another wife living, to whom he had been lawfully married, and from whom he was not divorced.

From said action an appeal was taken on April 19, 1901.

Although this case has been subjected to a careful investigation by special examination, the material facts appearing in evidence are meager. It appears that the appellant married the deceased soldier, by

ceremony, in the city of Buffalo, N. Y., on December 25, 1880, after only about two months' acquaintance with him, and with no previous knowledge whatever of his history, and within three months of the death of a former husband. She continued to live with the soldier as his wife until his death, which is shown to have occurred on May 13, 1895, as alleged, in the city of Buffalo, N. Y., where the parties resided during the whole period of their married life.

The evidence obtained on special examination in this case shows conclusively that the soldier had been previously married in the city of Paris, France, both by religious and civil ceremony, in accordance with the law of that country, to one Henrietta Wentz, on September 21, 1850, with whom he shortly afterwards emigrated to the United States, and resided in a place called Fort Ann, in the State of New York. The soldier and said Henrietta resided in this latter place as man and wife, and were universally recognized there as such up to the date of the soldier's enlistment in the Army in August, 1862, one child, a daughter, being born to them. After the discharge of the soldier from the service in June, 1865, the evidence shows that he returned to his wife and child at Fort Ann, N. Y., built a house for his family and continued to live with them until April, 1867, when he deserted his wife and never afterwards returned to her. The testimony shows that the first wife of the soldier, Henrietta, was a highly respectable, good woman, but that the soldier, after his army service, became very intemperate and irregular in his habits and course of life, failed to provide a support for his family, neglected his wife and child, and finally deserted them upon the date aforesaid. The first wife, Henrietta, continued to reside with her daughter, the child of the soldier, in the same place, and in the house that had been built by the soldier, until her death, which is shown to have occurred on March 17, 1889, about eight years after the marriage of the soldier to this appellant. The evidence shows, beyond question, that no divorce from the soldier was ever applied for or obtained by the first wife, Henrietta. The soldier is shown to have resided continuously in the State of New York, and since it is proved that he voluntarily deserted his first wife without good cause, no presumption that he obtained a divorce from said first marriage can be founded upon the circumstances of this case, nor is it alleged or claimed that he ever did.

It is, therefore, well established by the evidence that said first marriage of the soldier was in full force and effect at the time of his second marriage to this appellant, and, therefore, said second marriage was, at the time of its consummation, illegal and absolutely void under the laws of the State of New York, the soldier then having a lawful wife living and undivorced.

The first wife of the soldier is shown to have died some six years prior to the soldier's death, and the only question left for considera-

tion in this case is whether or not a lawful marriage can be considered to have arisen, or to have taken place between the appellant and the soldier after the removal of the impediment to their lawful union, and during the interval of six years that they lived together as husband and wife, between the death of the first wife and the death of the soldier. There can be no question about the fact that at the date of the marriage of the appellant and the soldier, and up to the date of the death of the first wife in 1889, their union was illegal, meretricious, and had no force or effect whatever in law. In order to change this relationship from an unlawful to a lawful and matrimonial one, it must be shown that the parties thereto had, by mutual consent, entered into a new matrimonial contract to be husband and wife, subsequent to the removal of the impediment to their marriage. This might be inferred from any circumstances indicating a change in the relationship of the parties to each other showing an intent to be lawfully married, but mere cohabitation and recognition as husband and wife in pursuance of the void ceremonial marriage is not sufficient for this purpose. In this case the appellant swears positively, and in this she seems to be fully corroborated by all the other testimony in the case, that she had no knowledge whatever that the soldier had ever been previously married, or of the existence of the first wife, Henrietta, until after the death of the soldier, and that her first knowledge of these facts was obtained through the investigation of this case by the Pension Bureau.

It is very evident, therefore, that since the appellant had no knowledge of the existence of the impediment during her cohabitation with the soldier, she could not have consented to any new agreement or contract of marriage with the soldier after the removal of the impediment. It would be impossible under these circumstances to establish the fact that a valid common-law marriage had been consummated between the soldier and the appellant after the death of the first wife Henrietta. The marriage of the soldier and the appellant having been illegal and void in its inception, and no change whatever in their relationship to each other having ever taken place, it remained an illegal and a void union during the whole time of its existence, and the appellant was never at any time the lawful wife of the soldier and is not his pensionable widow.

In the case of *Ellen A. Palmer* (7 P. D., 363), which was a case of a marriage celebrated in the State of New York, it was held by this Department:

Where one of the parties to a marriage is ignorant of the fact that the other party had, at the time of such marriage, a legal husband or wife living from whom he or she had not been divorced, and died in ignorance of such fact, it becomes a legal impossibility for the surviving party to such second marriage who alone had knowledge of the legal impediment to prove a legal marriage, as in such cases no consent can be proved after the removal of the legal impediment.

The same rule was also announced in the cases of Harriet Comstock (10 P. D., 220) and Sallie A. Fuller (ibid., 238), both of which were cases of New York marriages, and the decisions therein were fully sustained by citations from the decisions of the courts of the State of New York.

The decision of this Department in the case of Margaret J. Anderson (4 P. D., 67), which is cited and relied upon in support of the appeal in this case, was based upon the rule laid down by Bishop in his work on Marriage and Divorce, to the effect that where a common-law marriage by mutual consent of the parties is recognized as valid, a valid marriage will instantly arise after the removal of a legal impediment, if the parties continue to live together with matrimonial intent. This rule is, however, not now followed by this Department in pension cases, and the decision in the case of Anderson (*supra*) has been overruled by the cases of Elizabeth Schmidlin (6 P. D., 200), and Ann E. Server (7 P. D., 468), and Louisa S. Hoepfner (9 P. D., 487).

In view of the foregoing considerations, the Department is of the opinion that the rejection of this claim for widow's pension upon the grounds stated was not error, and said action is affirmed accordingly.

SERVICE—ENLISTMENT—MILITARY AGE—VOID ENLISTMENT.

JOSEPH B. HUGHES.

An enlistment of a minor under the age of 18 years in 1861 was voidable, and if he repudiated the contract of enlistment and subsequently reenlisted and served his term of enlistment for ninety days or more during the late war of the rebellion and was honorably discharged therefrom the failure to complete his first term of enlistment is no bar to his receiving a pension under section 2 of the act of June 27, 1890.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
January 15, 1902.*

Joseph B. Hughes, late private Companies C and D, Eighty-first New York Infantry, and Company B, One hundred and nineteenth Pennsylvania Infantry, appealed March 20, 1901, from the Bureau action of June 1, 1896, dropping his name from the roll as pensioner under the act of June 27, 1890 (Cert. No. 679242), on the ground that he was a deserter from his first enlistment, as shown by the records of the War Department.

Claimant contends that he was a minor 16 years of age at the date of his first enlistment in the Eighty-first New York Infantry in 1861, and was taken from the service by his father; that he ran away from home soon after and reenlisted in the One hundred and nineteenth Pennsylvania Infantry, and served faithfully under said enlistment until the

close of the war and was honorably discharged; that he had no intention of deserting, but was compelled to yield to the authority of his parent. He contends that he is entitled to be restored to the rolls and cites the cases of Jasper M. Stine (9 P. D., 488) and Stephen F. Monthony (11 P. D., 193).

The Bureau reported December 20, 1901, as follows:

The question of voidability of the enlistment in 1861 of a person under 18 years of age in its bearing on claims under act of June 27, 1890, seems not to have been definitely determined by any of the recent decisions on the subject.

The decisions in the Stine case (9 P. D., 488) and the Monthony case (11 P. D., 193), referred to in the appeal, both relate to claims under the general law.

The decision in case of Loeb, alias Lyons (11 P. D., 286), relates to a claim under act of June 27, 1890, as does also that in the Samuels, alias Smith, case (No. 21 current), but neither of these determines the question at issue in this case, unless it be by implication. It would seem to be a natural inference from these last mentioned decisions that in case of a soldier under 18 years of age enlisting in 1861 the enlistment is voidable, and that subsequent desertion would not be a bar to pension under act of June 27, 1890, based on a subsequent service from which he was honorably discharged, and that therefore this claim should be reopened, but that such is the position of the Department is not definitely stated.

I note furthermore that this soldier deserted March 6, 1862, subsequent to the act of February 13, 1863, providing that "the oath of enlistment taken by the recruit shall be conclusive as to his age."

The records of the War Department show that soldier enlisted November 1, 1861, at Oswego, N. Y., in Company C, Eighty-first New York Infantry, for three years; was transferred to Company D, of said regiment, and he is reported as having deserted March 6, 1862.

He enlisted in Company B, One hundred and nineteenth Pennsylvania Infantry, as a musician August 15, 1862, for three years, and was honorably discharged June 23, 1865.

Claimant has filed some testimony tending to show that he was born February 22, 1845, which would make his age 16 years 8 months and 9 days at date of his first enlistment.

The minimum age for enlistment prior to the act of July 4, 1864 (13 Stat. L., 379), was 18 years, although the act of February 13, 1862 (12 Stat. L., 339), provided that "the oath of enlistment taken by the recruit shall be conclusive as to his age."

This act was not retroactive and applied only to those enlistments occurring on or after the date of the passage of the act, and would therefore not apply to claimant's first enlistment in 1861.

The laws as to the legal age of those liable to do military service in 1861, and up to the act of May 15, 1872 (17 Stat. L., 117), was quite fully considered by this Department in the case of Aura Hetherington (10 P. D., 355), cited and followed in the recent decision in the case of Samuels, alias Smith (12 P. D., 80). See also in addition to the authorities cited in the Bureau report, *supra*, Edward E. Napier (11 P. D., 240).

It was held in the Stine case (9 P. D., 488) that—

A contract of enlistment by a minor under 16 years of age is either void or voidable, and if he repudiate the same by deserting, he can not be held to the performance of further service thereunder * * * and his reenlistment within the terms covered by his former contract of enlistment is not thereby invalidated.

In that case reference was made to 16 years because the age of Stine was alleged to be less than 16 years at the date of his enlistment, but as stated in the case of Loeb, alias Lyons (11 P. D., 286)—“It was only necessary for Stine to have shown that he was under the age of 18 at the time of his first enlistment in 1861, since that was the minimum age of enlistment from March 16, 1862 (2 Stat. L., 134), to July 4, 1864 (13 Stat. L., 379).”

It therefore follows that an enlistment of a minor under the age of 18 years in 1861 was voidable, and if he repudiated the contract of enlistment and subsequently reenlisted and served his term of enlistment for “ninety days or more during the late war of the rebellion” and was “honorably discharged therefrom,” the failure to complete his first term of enlistment is no bar to his receiving a pension under section 2 of the act of June 27, 1890.

The presumption is that enlistments are regular and valid; that the recruiting and mustering officers performed their legal duty, and that the recruit was of legal military age, and the burden of proof is upon the one who questions the legality of the enlistment.

Without passing upon the question as to whether the evidence offered in this case is sufficient to outweigh the presumption of the validity of claimant's first enlistment, inasmuch as the Bureau appears to have been in doubt as to the law applicable to this case, the action appealed from is reversed, the case is reopened for readjudication, in accordance with law as herein announced, after a special examination for the purpose of determining the question of claimant's age at date of his said first enlistment in 1861.

WIDOW'S CLAIM ACT, MARCH 3, 1901—REMARRIAGE.

SUSAN CRYSLER (WIDOW).

The claimant's name never having been on the rolls under the general law, she has no title to pension under said act; and as there is no pensionable period between the date of the death of the soldier and claimant's remarriage her name can not now be placed on the rolls under the general law.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
January 17, 1902.*

Susan Cryslér (now Walker), as widow of James H. Cryslér, formerly private, Company B, Fourteenth Wisconsin Volunteer Infantry, filed

claim for pension under the general law, as amended by the act of March 3, 1901, April 24, 1901, which was rejected in the following stated language:

Approved for rejection on the ground that claimant was never on the pension roll, and can not now be put on, because all pension due on account of above soldier has been paid, under the law as it existed at the date when allowance was made to soldier's minors after the remarriage of the widow.

January 2, 1902, the claimant filed an appeal to the Department, contending that a review of the case would lead to a reversal of the action of the Bureau on the question of law presented.

The issue raised is one which involves a construction of the act of March 3, 1901. The portion of the act material to this inquiry is as follows:

That section forty-seven hundred and eight of the laws of the United States governing the granting of Army and Navy pensions be, and the same is, amended to read as follows:

The remarriage of any widow, dependent mother, or dependent sister entitled to pension shall not bar her right to such pension to the date of her remarriage, whether an application was therefor filed before or after such marriage; but on the remarriage of any widow, dependent mother, or dependent sister having a pension, such pension shall cease: *Provided, however,* That any widow who was the lawful wife of any officer or enlisted man in the Army, Navy, or Marine Corps of the United States during the period of his service in any war, and whose name was placed, or shall hereafter be placed, on the pension roll because of her husband's death as the result of wound or injury received or disease contracted in such military or naval service, and whose name has been or shall hereafter be dropped from said pension roll by reason of her marriage to another person who has since died or shall hereafter die, or from whom she has been heretofore or shall be hereafter divorced, upon her own application and without fault on her part, and if she is without means of support other than her daily labor as defined by the acts of June twenty-seventh, eighteen hundred and ninety, and May ninth, nineteen hundred, shall be entitled to have her name again placed on the pension roll at the rate now provided for widows by the acts of July fourteenth, eighteen hundred and sixty-two, March third, eighteen hundred and seventy-three, and March nineteenth, eighteen hundred and eighty-six, such pension to commence from the date of the filing of her application in the Bureau after the approval of this act.

The above statute is expressed in clear, plain, and unmistakable language and but one meaning can be attached to it, and it needs no application of the ordinary rules of construction to ascertain its meaning.

It is clearly stated that the widow of a soldier who died from service causes, "whose name was placed or shall hereafter be placed on the pension roll," and remarries, and such marriage was subsequently dissolved by death or divorce, and such widow is dependent thereafter within the meaning of the law, she may have her "name again placed on the pension roll," on filing an application and making the proof required in accordance with law.

In the case under consideration the soldier died in the service in 1864; his widow (the claimant) remarried in 1865 and lived with her

last husband until his death in 1899. As widow of the soldier, after his death in the service she made an application for pension, but her name has never been placed on the pension roll as such widow. She is, therefore, barred from pension by the terms of the above quoted act.

It is to be noted, however, that there was another ground given for the rejection of the claim by the Bureau, namely:

That claimant was never on the pension roll, and can not now be put on, because all pension due on account of above soldier has been paid under the law as it existed at the date when allowance was made to soldier's minors after the remarriage of the widow.

It is true that the fact that claimant's name was never on the pension roll as the widow of the soldier is a bar to her title under the act of March 3, 1901, yet under the terms of the act the widow's name might "hereafter" be placed on the rolls in accordance with the provisions of section 4708, Revised Statutes of the United States, as follows:

The remarriage of any widow, dependent mother, or dependent sister, entitled to pension, shall not bar her right to such pension to the date of her remarriage, whether an application therefor was filed before or after such marriage; but on the remarriage of any widow, dependent mother, or dependent sister, having a pension, such pension shall cease.

In the case of Rhoda E. Tuten (12 P. D., 83) the very point put in issue here by the language of the rejection by the Bureau was fully discussed, and it was there held:

Section 4 of the act of March 3, 1865, placed title in the minors, to the exclusion of the widow, provided the widow remarried without payment to her of any part of the pension, and said section was not repealed or modified, so far as such issue is concerned, by any act prior to March 30, 1868, the date on which the claim of the widow herein was rejected.

In the case under consideration the present claimant filed a claim for pension under the general law February 23, 1865, which was rejected March 27, 1866, on the ground of her remarriage. July 12, 1867, pension was granted the minor children of the soldier, which they drew until the date they arrived at the age of 16 years, covering the full period from the date of the death of the soldier to the date of claimant's remarriage.

Section 4 of the act of March 3, 1865, provides:

In case of her (widow's) death or remarriage without payment to her of any part of the pension hereafter mentioned, his child or children under 16 years of age shall be entitled to receive the same pension as the husband or father would have been entitled to under said act had he been totally disabled, to commence from the death of the husband or father.

It will thus be seen that under the law existing at the time the minors were paid pension their title on the remarriage of the widow was to the whole sum due, and the full amount having been paid the minors in accordance with law the claimant's name can not now be placed on

the rolls under the general law, there being no period during which any money is due her as the widow of the soldier between the date of his death and her remarriage. See case of Rhoda E. Tuten (22 current series) and cases therein cited.

It is clear that the finding of the Bureau that claimant had no title to pension under the act of March 3, 1901, because her name had never been on the rolls under the general law, was right, and the further finding that her name could not now be placed on the rolls under the general law was also proper, and for the reasons given.

The action of the Bureau from which appeal was taken is affirmed.

LINE OF DUTY—ON A PASS TO VISIT FRIENDS.

ROBERT A. SMITH.

The evidence showing that the injury for which claimant seeks pension was incurred while he was absent from his proper command by verbal permission of his captain, for the purpose of visiting his family, and that at the time of said injury he was not performing any military service, but was running from some rebel cavalry, having joined, in his flight, some other troops, with whom he remained several days hiding out in the woods, it is

Held, that his injury was not incurred in the line of duty.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 17, 1902.

The appellant, Robert A. Smith, formerly sergeant of Company A, Fifth Tennessee Cavalry, filed a claim for pension July 22, 1882, alleging that while in said service and in the line of duty at Liberty, Tenn., in the fall of 1864, he sustained an injury of the back by his horse throwing him against a tree. The claim was rejected by the Pension Bureau in April, 1886, on the ground that it appeared from the records that the claimant was absent without leave at the time the alleged injury was received, and was therefore not in the line of duty. It was subsequently reopened, upon the filing of additional testimony, and again rejected in September, 1890, on the ground that there was no satisfactory evidence that the alleged injury of back was incurred in the line of duty. From that action an appeal was taken May 20, 1899, the claimant contending that the testimony filed by him shows that he was not absent without leave, but that he had leave from his first lieutenant, and that the injury to his back for which he claimed pension was incurred in the line of duty. Some additional testimony filed by him in 1897 was considered in January, 1900, and held to be not sufficient to warrant any change of action. An appeal from that decision was filed May 19, 1900.

The appellant enlisted August 9, 1862, and was discharged June 25, 1865. He related the circumstances of the incurrence of his injury to a special examiner June 25, 1890, as follows:

In the first part of August, 1864, my company was stationed at Tullahoma, Tenn., and we started out on a detail, made from several companies, to scout through this country. * * * We went in this scout through Coffee, Cannon, Warren, and Dekalb counties, and came through this town (Liberty), and I was then about 3 miles only from my home, and Captain Floyd gave me verbal permission to go home and see my family for a few days. I went home, and the next day the detail went on back toward Tullahoma. I don't remember that the captain specified how long I was to remain at home. I think I just said, "Captain, let me go home for a few days," and he said, "All right." The understanding was that I should rejoin my company in a few days at Tullahoma. * * * Joe Blackburn, who had been my captain, was right here in Liberty raising a regiment and had some three or four companies together; and C. N. Woodside was here, too, I think, building a stockade with a company of Colonel Gantt's mounted infantry. * * * I went home and stayed five or six days, or maybe longer, and maybe not so long, and then I came down to Liberty, intending to meet some more of the boys who had been given leave to stay home a few days also, and then all of us go back to Tullahoma together. We wanted to travel with as many men as we could as protection from bushwhackers. I came down to Liberty and waited for the other boys to come, but they did not put in an appearance. * * * I remained in town, and about 4 or 5 o'clock p. m. Wheeler's cavalry (his advance guard) came right into town. We had a few minutes' warning, and I got to where my horse was hitched, and at that time the rebels were just filing into town. My horse was hitched just at the outside of town, and after I got on him I came back to the center of the town, and I saw there was a mighty big body of rebels coming along. I could have turned around and got home, I reckon, but I saw Blackburn's and Woodside's men scattering from the stockade and the town over the "Tater Knob" Mountain, and I thought they were probably going to fight the rebels, and I rode over and joined them. I thought it would be cowardly to desert them in such an emergency, so I just went and mingled with them. I couldn't stand the thought of running off and leaving Blackburn and Woodside and so many of the men who had been in the Fifth Tennessee Cavalry with me at such a time. I enlisted to fight, and I thought fighting was my business then or any other time. The boys were all surprised and huddled together and scattering this way and that, all in a stampede, you might say. When I got among them I soon found there was no fight in them, except a sort of a running fight. The rebels were shooting at them and the boys would fire back and then run. No one seemed to be giving any orders. Every man was doing the best he could for himself, so when I got in the crowd I lit out for myself. I rode up and over the hill, and as I was going down the other side my horse stumbled and pitched me off against a tree. * * * I struck on the small of my back and rather on my left side or hip. * * * Ever since then I have had a weak and sore back.

Question. Did Col. J. H. Blackburn command you to join his forces and fight when Wheeler's cavalry came through?

Answer. No, sir; I just put myself under his orders of my own accord, as I have stated.

Question. Did you report to him?

Answer. No, sir; I did not see him until he came to where I was in the woods several days afterwards. But I went over to the boys, intending to fight with his men against the rebels, and had we drawn up in line I would have been under his orders. My going with those boys was entirely voluntary. I was under no orders but my own.

A report from the War Department, furnished December 3, 1883, stated that the claimant was reported on the muster roll of his company for July and August, 1864, "Absent without leave since August 20, 1864." On March 21, 1891, a new report was furnished stating:

It has been determined from evidence before this Department that the charge of absence without leave of August 20, 1864, appearing on the company muster roll of August 31, 1864, against this soldier is erroneous; that he received verbal permission from his company commander on some undetermined date in August, 1864, to absent himself from his command for a short period; that he was prevented by the enemy from rejoining his proper command promptly upon the expiration of his verbal pass (about August 20, 1864); that in endeavoring to rejoin his command he was detained on temporary duty with Company G, First Tennessee Mounted Infantry Volunteers, stationed at or near Liberty, Tenn., and that he was on duty with that company on August 31, 1864, and was under proper military control thereafter until he rejoined his proper command prior to October 31, 1864.

In his deposition before the special examiner, on June 25, 1890, the claimant stated that he had recently learned the exact date of his injury and that it was August 18, 1864, an old resident of Liberty having assured him that that was the date of Wheeler's appearance there. This, however, is clearly an error. It appears from "Chronicles of the Rebellion," pages 82 and 83, that on August 20, 1864, Wheeler's cavalry was operating along the East Tennessee Railroad, in the vicinity of Stewart's Landing. On the 22d he was approaching Knoxville. On the 29th he was reported advancing upon Nashville, via McMinnville and Murfreesboro, the latter place being about 40 miles southwest of Liberty. On the 31st he appeared upon the line of the Great Western Railroad between Nashville and the Tennessee River, far to the west of Liberty. It is probable that he passed through the latter place on the 29th or not later than the 30th.

The amended report from the War Department showing the claimant to have been "under proper military control" on and after August 31, does not touch the question at issue, which is whether he was in the line of duty when he was injured, i. e., on the 29th or 30th. It appears from his statement and other evidence in the case, that after the retreat from Liberty he stayed out in the bushes with Woodside's and Blackburn's men for several days, and Colonel Blackburn testifies that during that time he ordered him to take charge of some prisoners, but has no recollection of giving him any orders before that.

The War Department having amended its records so as to show that the claimant went home by verbal permission of his company commander; that he was prevented by the enemy from rejoining his command promptly upon the expiration of his verbal pass, and that in endeavoring to rejoin his command he was detained on duty with Company G, First Tennessee Mounted Infantry, stationed at or near Liberty, Tenn., the amended record will be accepted as establishing those facts. (It is shown by his own statement that he did not remain with the men of

the First Tennessee Mounted Infantry more than four or five days, and that he then went home and remained there a few days before starting back to his regiment. This casts some doubt on the record showing him to have been "under proper military control" from August 31, 1864, until he rejoined his command.)

It is further shown by competent and apparently reliable testimony that the claimant was in Liberty on the day Wheeler's Cavalry passed through that place; that he joined the fleeing forces of Lieutenant Woodside and Colonel Blackburn, and that during the flight over the mountain he was thrown from his horse and sustained an injury of the back.

The question to be considered is whether, under these circumstances, the injury may be regarded as having been incurred in the line of duty.

Generally speaking, a soldier is not "in the line of duty" while absent from his command on individual furlough for purposes of his own business or pleasure. He is not out of the line of duty, however, by reason of being on furlough solely, but because, during the continuance of the furlough, he is attending to his own private business and not to his business as a soldier. The effect of the furlough is to relegate him, for the time being, to the status of a civilian. At the same time he is not wholly discharged from his obligations as a soldier and may be called upon to perform military service, or may find himself in circumstances in which it is incumbent upon him to render such service without being called upon. This is made very clear by Attorney-General Cushing in his well-known opinion on "Line of Duty" (7 Op. Atty. Gen., 149), in which he says:

When it is remembered that no commissioned officer, or enlisted soldier, seaman, or marine has power to cast off his obligation at will; that whether he be on duty or off, in glory as in disgrace, still the banner of his country is over him and its oath upon his conscience; when this great fact shall be remembered it must be inevitable to concede that any rule, based on the assumption of its being impossible for an officer or soldier, on furlough, on leave of absence, in arrest, under sentence, to perform acts, suffer casualties, receive wounds, or incur causes of disease, in the line of his duty, is not a truth, and, like all things not true, can not be conformable to justice or wisdom. As, while on active duty, he may do or suffer things not in the line of his duty, so, whilst off duty, or on furlough, or under censure, he may do or suffer things which are in the line of duty.

Elsewhere, in the same opinion, the learned author says:

A soldier or sailor while under arrest is not discharged from the obligation of duty, and is occasionally called upon to perform duty in which he may distinguish himself and die honorably, and leave, it seems to me, a right of pension to his widow or children, as, for example, in the contingency of a post or camp attacked by the enemy or a ship in peril at sea. So, still more, of an officer on furlough. So it may be in case of a soldier temporarily absent on leave; nay, even of one compromised in some grave military offense.

Applying the rule here laid down to the case now under considera-

tion, it seems plain that if the claimant had been ordered by Lieutenant Woodside or Colonel Blackburn to assist in defending the stockade at Liberty or in making a stand against the enemy, he would, while obeying such order, have been in the line of his duty.

We may go a step further and say that if, seeing a defense of the town or stockade about to be made, he had, without orders, ranged himself on the side of the defenders and rendered efficient service, and while so doing had incurred some wound or injury, he would clearly be entitled to pension for any resulting disability.

But such are not the facts. It appears, from his own statement, that he did nothing in the way of fighting, but simply had a mind to do something, until, seeing that no stand was to be made against the enemy, he "lit out" for himself, and while lighting out (and, according to the testimony, going at a pretty rapid gait) he was hurt.

Can it be truthfully said that he was injured by reason of the performance of any military duty? There is no evidence, except his own statement, that his purpose in joining other soldiers was to fight the enemy, or that he could have better secured his own personal safety in some other way. All we know is that when the enemy appeared the troops stationed in the town scattered and fled over the mountain, and that he went along with them.

It is not denied that a soldier may be in the line of duty when retreating as well as when standing still or advancing, but it is believed that when pension is claimed for an injury incurred by a soldier while unattached to any military organization and not acting under orders, he may properly be required to show that the incurrence of the injury had relation to the performance of some valuable or meritorious service and not merely to his running from the enemy in the direction in which the crowd was going.

If the claimant had not stopped in Liberty, but had gone on directly from his home toward Tullahoma and on the way had been thrown from his horse, he would not have been pensionable for any resulting injury under the rulings of the Department. (See cases of Elizabeth Bragunier, 9 P. D., o. s., 250; Sarah Croft, 1 P. D., 279; Catherine Ott, 4 P. D., 47.) Neither would he have been pensionable if the injury had been incurred while running from bushwhackers or rebels, the rule being that "a soldier voluntarily absent from his company is out of the line of duty and exclusively responsible for whatever casualties befall him when not legitimately connected with the military service." (William H. Cummings, 1 P. D., 351; John Yant., id., 118.) Thus, where a soldier was shot by guerrillas while returning to his command, after having been absent for several days on leave for the purpose of visiting his family and friends, it was held that the wound was not incurred in the line of duty. (Daniel V. Melvin, 8 P. D., 89.) But where a soldier was captured by the enemy while on individual fur-

lough and died while a prisoner of war, "line of duty" has been admitted, the cause of death in such a case having been incurred, not "during such furlough," but while "held in duress by the enemy and physically unable to comply with the terms of the furlough, although presumably desirous to do so." (Mary Ellason, 3 P. D., 100; also the case of Ellen Anderson, 6 P. D., 197.)

In the case now under consideration the furlough was not definitely limited as to time, being for "a few days." It must be construed to have extended from the time the claimant left his command to the time he reported for duty to Colonel Blackburn or was assigned by the latter to duty. The injury was, therefore, incurred "while on furlough." It was not incurred while performing any military service, but while seeking personal safety by flight. After careful consideration of the evidence and the precedents applicable to the case, the Department is unable to find that the claimant was in the line of duty at the time of his injury. The action from which the appeal is taken is, therefore, affirmed.

JURISDICTION—GUARDIANSHIP—PENSION FUND—ACCRUED PENSION.

GUARDIAN OF GEORGE J. BRICK (INSANE).

The Commissioner of Pensions is without authority, in the absence of legislation by Congress giving him power so to do, to suspend the quarterly payments of pension to the duly appointed and qualified guardian or committee of an insane pensioner solely upon the ground that funds have accumulated in the hands of such guardian or committee in excess of the needs of the insane pensioner, and when there is no charge or proof of any maladministration, embezzlement, or unlawful conversion to his own use by such guardian or committee of the pension money in his hands belonging to his ward.

The decision of this Department of May 22, 1901 (11 P. D., 351), is hereby modified and overruled.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 27, 1902.

George J. Brick, late a private in Company I, Eighth United States Cavalry, is a pensioner under the provisions of the general pension law at the rate of \$72 per month for insanity, pursuant to pension certificate No. 250059, issued September 15, 1883. Said pension has been paid since the date of its allowance to Margaret Brick, the duly appointed and qualified committee of said insane pensioner.

On September 4, 1901, the Commissioner of Pensions instructed the pension agent at Philadelphia, Pa., to make no further payment of pension to the committee of said insane pensioner without additional instructions from the Pension Bureau upon the ground that an account of said committee for the year ended November 4, 1900, showed that said committee had funds belonging to the pensioner in her hands to the amount of about \$9,834.33. The pension agent was informed that

it was the intention to withhold future payments of pension to the committee in this case until it should appear that there was need of further payment of pension to meet the expenses of the pensioner's maintenance.

From this action of the Commissioner of Pensions the present appeal was taken to this Department on December 24, 1901, in which it is contended, as grounds for appeal, as follows:

1. That the action of the Commissioner of Pensions in suspending the payment of this pension is without authority of law, and is contrary to any decision of the courts, or of the Department of the Interior properly construed.

2. That in the absence of either knowledge or suspicion that the guardian for this soldier is guilty in any manner of a maladministration of her trust the Commissioner of Pensions is without discretion to suspend the payment of the pension of her ward, and that as the statute providing for the payment of the pension of an insane pensioner to a duly appointed guardian has failed to declare that the conservation of the ward's interests and the consequent accumulation of a fund for the use and benefit of such ward shall constitute a ground for the suspension of such pension, it is without the power of an executive officer to add conditions and penalties not in the statute as drawn.

It is stated by the Commissioner of Pensions, in a report accompanying the appeal in this case, that the order suspending payment of pension and the instructions given to the pension agent, from which this appeal is taken, were based upon a decision of this Department embodied in a communication addressed to him under date of May 22, 1901, and published in 11 P. D., page 351.

The decision of the Department referred to by the Commissioner of Pensions was rendered in reply to a communication from him requesting instructions as to the proper course of action in a certain class of cases therein referred to, and was general and advisory in its scope and intent, and was not rendered with reference to, or upon the facts presented in any given case. Said decision, in effect, held:

1. The guardian of a pensioner is the agent of the United States for the proper expenditure of pension money in his hands, irrespective of the duties devolved upon him by the State law.

2. A pension fund granted to a pensioner, in the hands of a guardian, is in transitu until it reaches its final destination, and is controlled only by the United States; and the Commissioner of Pensions is invested with the discretionary power necessary to the proper administration of the pension law, and guardians holding pension funds are subject to his direction, both before and after the death of their wards.

3. All funds which have accumulated in the hands of a guardian by operation of the pension law and have not been paid to the pensioner or expended in accordance with law in his behalf are in the nature of accrued pension.

4. An unexpended pension fund in the hands of a guardian has not, in legal contemplation, been paid to the pensioner, and is an accrued pension.

5. The act of March 2, 1895, is the law of distribution of accrued pension of a deceased pensioner, and applies to the fund in the hands of a guardian unexpended at the time of such pensioner's decease.

These conclusions were based upon the decision of the Supreme Court of the United States in the case of *United States v. Hall* (98 U. S., 343). The facts in that case were so fully set forth in the departmental

decision above referred to that it is not deemed essential to recapitulate them at this time further than may be necessary in considering the question presented by the present appeal. Suffice it to say that the case of the United States *v.* Hall grew out of the criminal prosecution of a guardian for the embezzlement of money belonging to his ward which had been paid to the former by the Government as pension, and for which he was indicted in the circuit court of the United States for the southern district of Ohio, under the provisions of section 4783, Revised Statutes. The sole question which the Supreme Court had before it and which it decided was whether Congress had power under the Constitution to pass an act making the embezzlement by a guardian of the pension money in his hands an offense triable and punishable in the courts of the United States, and whether the offense defined by the act of Congress providing for the punishment of embezzlement under such circumstances could be committed after the pension money had been paid over by the Government to the guardian. The court held that Congress has, under the Constitution, power to declare that the embezzlement or fraudulent conversion to his own use by a guardian of the money which he, on behalf of his ward has received from the Government as a pension due to the ward is an offense against the United States, and to vest the proper circuit court with jurisdiction to try and punish him therefor, and this was all that was before the court for decision in said case.

A careful review and reconsideration of the decision of the Supreme Court shows that the whole argument of said decision was to the effect that Congress had power to protect the funds in the hands of a guardian arising from the payment of pension money to the ward from misappropriation, fraud, and unauthorized conversion to the use of another, and to secure, by appropriate legislation, its safe and unimpaired transmission to the beneficiary, and that, inasmuch as Congress had seen fit to exercise this power to the extent of making the embezzlement of such funds by the guardian an offense against the United States triable and punishable by the Federal court, such acts of Congress were valid and constitutional. The court held that the guardian could not avoid his individual criminal liability for such offense by reason of the fact that the money had been paid to him as a guardian appointed by and accountable to a State court, and in this connection stated that the word "guardian" as used in the acts of Congress is merely the designation of the person to whom the money granted may be paid for the use and benefit of the pensioner. In other words, that the use of the word "guardian" in the statute was, so far as his criminal liability under the acts of Congress was concerned, merely descriptive personæ.

Nowhere in said decision is it held or intimated by the court that, in the absence of direct legislation by Congress defining the offense, making the guardian punishable therefor, and conferring jurisdiction

upon some court to punish him, he could have been tried and punished in the courts of the United States for embezzling pension money belonging to his ward. On the contrary, it is distinctly stated by the court:

That before an offense can become cognizable in the circuit court the Congress must define or recognize it as such, and affix a punishment to it, and confer jurisdiction upon some court to try the offender. (*United States v. Hudson*, 7 Cranch, 32; *United States v. Coolidge*, 1 Wheat., 415; 1 Am. Cr. L., sec. 163.)

Said decision did not, either directly or impliedly, hold that the power of the Government to follow the pension funds into the hands of the guardian and to protect it from misappropriation, or to secure its safe and unimpaired transmission to the beneficiary, could be exercised by any court, or by an executive officer of the Government, without legislation by Congress authorizing the exercise of such power. Congress did authorize the exercise of such power to the extent of making the guardian criminally liable for the embezzlement of pension money belonging to his ward, and conferring jurisdiction upon the Federal courts to try and punish him for said offense, but no further, and the Supreme Court distinctly says that the theory that the act of Congress referred to—

augments, lessens, or makes any change in respect to the duties of a guardian under the State law is entirely erroneous, as the act of Congress merely provides that the pension may be paid to the person designated as guardian, for the use and benefit of the pensioner, and that the person who receives the pension, if he embezzles it or fraudulently converts it to his own use, shall be guilty of a misdemeanor, and be punished as therein provided.

Here it is distinctly recognized that by the existing law Congress exercised its right to control pension money after payment to a guardian for his ward only to the extent of punishing such guardian criminally if he embezzles it or unlawfully converts it to his own use.

It is true that the views expressed by the Supreme Court in the case of the *United States v. Hall* (supra) would lead to the conclusion that Congress had the power, if it had seen fit to exercise it, to authorize the Secretary of the Interior, the Commissioner of Pensions, or any other executive officer of the Government to direct and supervise the administration, expenditure, and disposition of pension money paid to a guardian for a pensioner under legal disabilities, and to provide that such funds should be administered by the guardian separate and distinct from other money belonging to his ward coming into his hands, irrespective of his obligations, liabilities, and duties under the laws of the State and the rules of the State court; but Congress has never attempted to do this by any legislation whatever.

In the absence of such legislation it would seem on further consideration to be clear that the decision of the Supreme Court in the *Hall* case does not furnish a proper basis or sufficient ground for the

conclusion announced in the departmental decision of May 22, 1901, that—

The guardian of a pensioner is the agent of the United States for the proper expenditure of pension money in his hands, irrespective of the duties devolved upon him by the State law.

Payment of pension money to the guardian or committee of a pensioner under legal disabilities is authorized by the provisions of section 4766 of the Revised Statutes, the part of which material to the subject now under consideration is as follows:

Hereafter no pension shall be paid to any person other than the pensioner entitled thereto, nor otherwise than according to the provisions of this title; and no warrant, power of attorney, or other paper executed or purporting to be executed by any pensioner to any attorney, claim agent, broker, or other persons shall be recognized by any agent for the payment of pensions, nor shall any pension be paid thereon; but the payment to persons laboring under legal disabilities may be made to the guardians of such persons in the manner herein prescribed, and pensions payable to persons in foreign countries may be made according to the provisions of existing laws.

This section is the law which provides for payment of pension money to the pensioner, and by which such money passes out of the possession of the Government into the possession of the pensioner, and when it so passes, in accordance with the provisions of said section, it is a payment of the pension. The section contains the explicit general direction that the pension shall be paid only to the pensioner entitled thereto, and that no paper or instrument executed by the pensioner authorizing its payment to any other person shall be recognized. Where the pensioner is laboring under legal disabilities it is clear that payment could not be made directly to him, since he would be without capacity to receive or receipt for it and would probably waste it if paid directly to him. Therefore the section makes provision for these exceptional cases by authorizing payment to be made to the guardian. The payment to the guardian is, then, by the express terms of the law, just as much a payment of the pension as is payment to the pensioner direct. This necessarily follows from the fact that the payment to the guardian, in the case of pensioners laboring under legal disabilities, is provided in lieu of payment directly to the pensioners themselves, they being incapable of receiving it. And since the law, except as otherwise provided in section 4766 of the Revised Statutes, as amended by act of August 8, 1882 (22 Stat. L., 373), does not provide for the payment of pensions in such cases to any other persons, it necessarily follows that the payment of a pension due to a pensioner laboring under legal disabilities, and having a guardian, must be made to the guardian if such pension is paid at all, and certainly the law does not contemplate that payment of the pension shall be withheld where there is anyone qualified to receive it. See act of December 21, 1893 (28 Stat. L., 18).

Since Congress has made no provision for the appointment of a guardian to administer the pension money of pensioners laboring under legal disabilities, and no Federal statute has ever been enacted directing the manner in which pension money belonging to such pensioners should be disbursed by the guardian to whom payment is authorized, and no attempt by Federal legislation has been made to control or direct the guardians of such pensioners in the proper management and administration of pension money in their possession, it is clear that by providing merely that pension money may be paid in such cases to the guardians of such pensioners, Congress has left all such matters to be controlled and governed by the State laws and the local courts under and by which such guardians are appointed.

It would seem to be most reasonable that if Congress had intended that the guardians of pensioners laboring under legal disabilities, to whom pension money belonging to such pensioners has been paid, should give an account of their acts and doings in the management, administration, and expenditure of such money, for the benefit of their wards, to the Commissioner of Pensions, such intention would have been expressed by Congress in a manner that would be certain and direct, and Congress would certainly have provided that such persons should be required to give bond with good and sufficient securities for such amount and in such form as the Secretary of the Interior, or some other officer might approve, conditioned for the faithful discharge of their duties. It would be most remarkable if the law authorized a pension due to a pensioner who is laboring under legal disabilities to be paid to a person designated, and who is thereafter to be regarded as solely the agent of the Government in the management and disbursement of the money for the benefit of the pensioner and at the same time made no provision requiring any bond or security for the faithful discharge of such trust.

The foregoing considerations lead inevitably to the conclusion that, in the absence of express legislation by Congress authorizing him so to do, and where there has been no maladministration, embezzlement, or conversion to his own use by a guardian of pension money in his hands belonging to his ward, the Commissioner of Pensions has no authority in law to direct, supervise, or interfere with the proper and regular administration, disbursement, and disposition of such funds under the laws and the rules governing the State court by which such guardian was appointed, and to which he is accountable, and having jurisdiction over the person and estate of the pensioner laboring under legal disabilities.

This conclusion is in entire accord with an opinion rendered by the Secretary of the Interior on September 5, 1899, in reply to a communication from the Commissioner of Pensions under the date of June 27, 1899, calling to his attention certain cases, exactly similar to the

case at present under consideration, in which funds had accumulated in the hands of guardians of certain insane pensioners in excess of the amount needed for their maintenance, or which were not being expended directly for the benefit of such pensioners, and requesting instructions as to the proper course of procedure by the Pension Bureau in such cases.

This opinion and holding of the Secretary of the Interior was not called to the attention of the Assistant Secretary, by whom the decision of the Department of May 22, 1901, was rendered, although the same had been in the possession of the Bureau of Pensions since the date of its rendition, and the departmental decision of May 22, 1901, was rendered in ignorance of the fact that the Secretary had expressed any views with regard to the matters therein discussed.

Said opinion of the Secretary of September 5, 1899, is addressed to the Commissioner of Pensions, and is as follows:

The Department has considered your letter of June 27, 1899, forwarding the papers in the claims of Samuel A. Champlain and Simon Carson, certificates Nos. 108973 and 30096, granted under the act of June 16, 1880 (21 Stat. L., 281), and in the claims of Arrington Mason and Thomas J. Raitt, certificates Nos. 99179 and 165218, granted under the act of March 4, 1890 (26 Stat. L., 16).

Your letter does not suggest that any error or irregularity occurred in the allowance of these pensions, or that the pensioners are not disabled to the extent and in the manner specified in the Statutes, but does state that the pensioners are insane; that they are inmates of hospitals or asylums; that their several guardians are applying only a small portion, or none, of the money received upon the pensions to the care and maintenance of the pensioners, but are accumulating such moneys for the benefit of the pensioner's estate, except in one instance where the moneys received from the pension are being turned over by the guardian to the wife of the pensioner. Your letter does not suggest that the pension money in either instance is being embezzled by the guardian, or fraudulently converted to his own use. While it is entirely competent for Congress to direct that the pension money shall be followed up and applied directly to the care and maintenance of helpless pensioners like these, there is seemingly no legislation upon that subject, and the matter is, therefore, one which, in the absence of such legislation, can only be corrected under the local laws relating to guardianships and in the local courts administering such laws. The matter is not one which, in the present state of legislation, falls under the supervision of either the Commissioner of Pensions or the Secretary of the Interior.

It furthermore appears that this subject has been brought to the attention of the Comptroller of the Treasury, who, in a decision, rendered December 21, 1901, discussing the questions considered and passed upon in the departmental decision of May 22, 1901, holds, in accordance with the views herein expressed, that pension money paid to the guardian of a pensioner laboring under legal disabilities passes out of the possession and control of the executive officers of the United States and becomes the property of the pensioner, and is not public funds which can properly be required to be paid into the Treasury of the United States, or accounted for by the accounting officers thereof.

In view of the considerations hereinbefore expressed, the Depart-

ment is of the opinion that, in the present case, there was no authority in law for the Commissioner of Pensions to order the suspension of the quarterly payments of the pension allowed the pensioner, George J. Brick, to this appellant as his committee, and that the order directing the suspension of such payments to the appellant until there should be shown to be need of further payments of pension to meet the expenses of the pensioner's maintenance was without authority of law, and should be rescinded.

It does not appear that there has been any error, irregularity, or illegality in the allowance of this pension to the pensioner, or that he is not entitled under the provisions of the law to the rate of pension that he has been receiving for his accepted disability, and, so far as appears from the papers and the evidence in the case, there is no ground for charging this appellant with any embezzlement, maladministration, or unlawful conversion to her own use of the pension money of her ward that had been paid to her by the Government as the committee of said insane pensioner. Under these circumstances, if it should appear that there was an undue accumulation of funds in the hands of the appellant as committee of the pensioner, and that the same was not being expended in his support and for his benefit, the proper course to pursue would be to bring that state of facts to the attention of the local court by which the appellant was appointed committee of said pensioner, and to which she is accountable in the administration of his estate, and which has jurisdiction over the person and estate of said insane pensioner. The Department is of the opinion that, in the present state of legislation on the subject, this is the only method that can properly be pursued for the correction of such evils as may exist in such cases, and that the result can not be attained by attempting to withhold from the committee of the insane pensioner the payments of a pension which have been legally adjudicated as due to him, and which the law provides must be paid.

The Department, therefore, hereby directs that the order of the Commissioner of Pensions withholding the payments of pension to this appellant as the committee of the insane pensioner George J. Brick, be abrogated, and that the pension agent at Philadelphia, Pa., be directed to continue the quarterly payments of said pension to the appellant as was formerly done prior to the issuance of said order of the Commissioner of Pensions in this case.

The decision of May 22, 1901 (11 P. D., 351), being in conflict with the views herein expressed is hereby vacated and set aside.

EVIDENCE—PRESUMPTION—SUFFICIENCY.

ANDREW CAMPBELL.

The fact that claimant had an attack of rheumatism while a soldier in the Mexican war does not furnish any just ground for concluding that he had said disease at the date of his enlistment in 1862, it having first appeared during his last service in 1864.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 20, 1902.

August 26, 1862, Andrew Campbell enlisted as a private in Company L, Seventh Missouri Volunteer Cavalry, and was mustered out June 13, 1865, as of Company L, First Missouri Volunteer Cavalry, to which he had been transferred. Said Campbell served in the Mexican war from June 10, 1846, to June 21, 1847, as a private in Company D, First Missouri Mounted Infantry Volunteers.

May 17, 1890, he applied for pension under the general law, alleging that—

In the fall of 1862, while on march south of Sedalia, Mo., he contracted diarrhea, resulting in piles, with which he remained afflicted ever since. And again, while detailed as support to a battery on the 10th of September, 1863, at battle of Little Rock, Ark., his hearing or ears were injured by the loud noise or concussion caused by firing of the artillery and caused permanent partial deafness. And again, during summer of 1864, while at Pine Bluff, Ark., he contracted scurvy and rheumatism, and his lungs and eyes became afflicted, as he believes the latter was brought on as a sequence of the scurvy, and that he has remained afflicted with the effects of said diseases ever since.

He was medically examined under this application twice, viz, February 4, 1891, and March 6, 1895, and once by an expert, to wit, July 10, 1896. His claim was specially examined and voluminous evidence taken. He was pensioned as a survivor of the Mexican war at \$8 per month May, 1887, and \$12 per month from March 15, 1894.

Soldier died February 7, 1899, and his widow, Mary E. Campbell, is seeking to complete the soldier's claim for pension under the general law.

May 16, 1899, the Bureau rejected said claim on the ground of—

No record, and claimant, aided by special examination, was unable to show by satisfactory evidence that piles, partial deafness, scurvy, or diseases of lungs or eyes originated in the service and line of duty. He admitted that he had rheumatism during Mexican war, and that he had not had diarrhea since the war of the rebellion.

June 6, 1899, the attorney for claimant filed an appeal from said action to the Department, and on June 30, 1899, he filed a duplicate appeal therefrom.

The evidence originally filed in the claim, consisting of affidavits, lay and medical, sufficiently showed the incurrence in the service and in

the line of duty of diarrhea and resulting piles, impaired hearing of both ears, scurvy, and rheumatism and affection of the lungs and eyes, and the continuance of these disabilities or their results, and the claim was legally approved for these disabilities on December 21, 1894, and November 7, 1896, respectively. But thereafter a special examination was ordered for some cause not apparent in the record.

The first special examiner who took evidence in the case reported, among other things:

I interviewed others, whose testimony I did not secure, but could not learn anything adverse to the claim.

It does not appear from said report whether the "others" interviewed knew anything material and favorable to the soldier's claim or not. In all cases sent to the field for special examination it should be distinctly understood that the examiner should investigate all the material facts ascertainable, whether favorable or adverse to claimants. The duties of special examiners are to protect the Bureau against claims which are not genuine; to obtain the real facts in just and lawful claims; they are charged with the protection of the interests of the Government and the rights of claimants; they are in no sense the attorneys of either the Government or the claimant. It would be proper in all cases where persons are interviewed by a special examiner and their evidence not taken for the examiner to report the names of all such persons and state his reason or reasons why their evidence was not taken.

These observations seem to be pertinent from the character of the language hereinbefore quoted from the report of the special examiner, which language might be misconstrued as conveying the impression that the examiner was only looking for evidence adverse to the claim.

It is stated in the action appealed from that—

He admitted that he had rheumatism during the Mexican war, and that he had not had diarrhea since the war of the rebellion.

As to the first of these, the claimant testified that:

At time I enlisted in late war I was free from disease of lungs and eyes, piles, impaired hearing, scurvy, rheumatism, and diarrhea.

Yes, I had had some rheumatism. I had an attack of rheumatism while I was in Mexico in the winter of 1846. My knees were swollen up and I had difficulty in walking five or six weeks. The doctor said I had rheumatism. My left knee was mainly affected. Was not in any hospital in Mexican war. I never felt any rheumatism during the time from discharge from Mexican war up to enlistment in late war.

In considering and weighing these statements under elemental rules of evidence they are to be taken together. When so taken the only rational deductions are that he had a brief attack of rheumatism in 1846; that from his discharge as a Mexican volunteer in 1847 he never felt any rheumatism up to and for some time after he enlisted in the war of the rebellion in 1862, and that he was free from rheumatism when he enlisted.

In other words, these facts would not in law nor in reason furnish any proper or just ground for concluding that he had rheumatism at the date of his enlistment in 1862, or that the rheumatism he is shown to have incurred under this enlistment was in any manner connected with or the result of the brief attack of it he had in 1846.

As to the chronic diarrhea, he testified that he—

First felt piles at some place between Pine Bluff and Little Rock, Ark. I had diarrhea and also rode horseback a great deal, and one or the other caused my piles. The piles got so bad that I could not sit in the saddle, and came down on me and bled. This was in the winter of 1863, and after that, while in the service, I continued to have piles from time to time. * * * I had diarrhea at time piles came on me. * * * I had piles at time of discharge and have continued to have attacks from time to time ever since up to the present. My piles are now very bad and protrude at times and bleed. No, I have not had any chronic diarrhea since discharge.

Applying to these statements familiar rules of evidence, they show incurrence of diarrhea in the service and resulting piles, and that while the diarrhea may have ceased to trouble the soldier, its results—piles—continued. While, under claimant's statement that his diarrhea has not troubled him since discharge, he would not be entitled to a pension for diarrhea, this would not justify the rejection of his claim as to piles and other disabilities sufficiently proven.

The evidence taken on special examination is not in any respect materially in conflict with the evidence originally submitted in the form of affidavits, except as to continuance of diarrhea, but in many respects the evidence taken on special examination adds to, strengthens, and makes the proof of the alleged disabilities, except diarrhea, clearer than it was in the original affidavits.

From a careful examination of the evidence, the Department is of opinion that the Bureau erred in rejecting the soldier's claim for piles, impaired hearing of both ears, results of scurvy, rheumatism, and affection of lungs and eyes, and the action rejecting these disabilities is accordingly reversed.

PRACTICE—NOTICE OF APPEAL—SERVICE—ACT OF MARCH 3, 1899.

HARRIET A. VAN HOUTEN v. RALPH R. VAN HOUTEN.

In the absence of due proof of service upon the appellee, or his or her attorney, of a copy of an appeal from Bureau action under the first, second, or third provisos of the act of March 3, 1899, there being no waiver of notice, or appearance by or on behalf of the appellee, the appeal will be dismissed. (See *Ellis v. Ellis*, 11 P. D., 288; *Loughry v. Loughry*, *Ibid.*, 523; *Conover v. Conover*, *Ibid.*, 524.)

In future such appeals, unaccompanied by due proof of service, in the absence of waiver of notice or appearance on the part of the appellee, will not be filed or docketed, but will be promptly returned to appellant, or his or her attorney of record, for compliance with Rule 14 of Practice, approved November 2, 1901.

When the appeal is perfected by due proof of service, it will be filed, docketed, and numbered, and the Bureau of Pensions, the appellant, and appellee promptly notified thereof, in accordance with Rule 15 of Practice, approved November 2, 1901.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
January 28, 1902.*

Ralph R. Van Houten, late private, Company H, One hundred and forty-first New York Infantry, and pensioner under certificate No. 294309, appealed May 16, 1901, by his committee, from the Bureau action of April 22, 1901, allowing the claim of Harriet A. Van Houten, filed January 9, 1900, for division of pension under act of March 3, 1899, on the ground that "pensioner deserted claimant, his lawful wife, who is a person of good moral character and in necessitous circumstances."

It is contended that claimant is not a person of good moral character; that she is not in necessitous circumstances; that pensioner did not desert her, but that she drove him from his home; that he has been declared to be an incompetent person by the court, and a committee has been appointed of his person and estate.

There is no proof of service of this appeal, as required by the rule in the case of *Ellis v. Ellis* (11 P. D., 288), *Loughry v. Loughry* (*Ibid.*, 523), and *Conover v. Conover* (*Ibid.*, 524).

Claimant has not entered her appearance in the appeal, nor waived service of notice thereof, and there is no evidence indicating that she has any knowledge thereof.

To adjudicate upon the legal rights of a person without notice is obnoxious to all sense of justice and a violation of the fundamental principles underlying American jurisprudence. As stated by the United States Supreme Court in the recent case of *Simon v. Croft* (182 U. S., 427), "The essential elements of due process of law are notice and an opportunity to defend."

Claims for division of pensions under the act of March 3, 1899, are not *ex parte*, but when contested are claims between contending parties whose legal rights are clearly defined and carefully guarded by the law.

This Department has therefore uniformly held that both the claimant and pensioner are entitled to notice and an opportunity to be heard in defense of the claim asserted by the other, and it follows that the appellee is entitled to a knowledge of the appeal from the Bureau action and the grounds on which the appeal is based.

In harmony with the early departmental decisions on this subject the Rules of Practice were amended November 2, 1901, by adding the following:

RULE 14.

Appeals from Bureau action in cases under the first, second, and third provisos of the act of March 13, 1899, should be accompanied by due proof of service of a copy of the appeal upon the appellee or his or her attorney of record.

Proof of service must be such as will satisfy the Department that the appellee has been informed of the appeal and the contents thereof, and may consist of, first, a

written acceptance of service by the appellee or his or her attorney of record; or, second, a postal "registry return receipt" card, signed by appellee or attorney of record, accompanied with an affidavit showing that on a certain date a copy of the appeal was mailed in a registered letter, postpaid, to the appellee or the attorney of record, addressed to a certain post-office, naming it, and that the card was returned in acknowledgment of the receipt of such letter; or, third, an affidavit showing that on a certain day and at a certain place a copy of the appeal was personally delivered to the appellee or his or her attorney of record.

Appeals in this class of cases, unaccompanied by due proof of service or a satisfactory reason why personal service can not be made, will not be filed, docketed, or considered, but will be promptly returned to the appellant or his or her attorney of record for compliance with this rule.

RULE 15.

Appeals from Bureau action in cases under the first, second, and third provisos of the act of March 3, 1899, when accompanied by due proof of service of a copy thereof upon the appellee, will be filed, docketed, and numbered, and the Bureau of Pensions, the appellant and appellee promptly notified thereof. The appeal will operate to suspend further payment of the one-half pension in controversy until a decision shall have been rendered therein by the Department, and the appellee will be allowed thirty days from the date of filing and docketing the appeal in which to file an answer, brief, or argument in opposition to the appeal, or in support of the Bureau action appealed from.

In the absence of due proof of service of an appeal from Bureau action under the first, second, or third provisos of the act of March 3, 1899, there being no waiver of notice, or appearance by or on behalf of the appellee, the appeal will not be entertained.

In future such appeals, unaccompanied by due proof of service, in the absence of waiver of notice or appearance on the part of the appellee, will not be filed or docketed, but will be promptly returned to appellant or his or her attorney of record for compliance with Rule 14 of Practice.

When the appeal is perfected by due proof of service it will be filed, docketed, and numbered, and the Bureau of Pensions, the appellant, and appellee promptly notified thereof in accordance with Rule 15 of Rules of Practice.

The appeal in this case is dismissed for want of proof of notice to the appellee or her attorney, and the papers are herewith returned.

Duplicate copies of this decision are herewith inclosed, to be forwarded to claimant and pensioner's committee.

MARRIAGE OF SLAVES IN KENTUCKY—ACT JUNE 27, 1890.

ELIZA J. ELLIS (WIDOW).

The appellant and the deceased soldier were colored persons residing in the State of Kentucky, and had been married while in a state of slavery in the year 1862, in accordance with the custom of slaves, but after their emancipation had taken no steps to ratify and legalize their subsisting slave marriage in the manner required by the statutes of that State.

Held: That the appellant can not be recognized as the widow of soldier, and is not entitled to pension as such under the provisions of the third section of the act of June 27, 1890. (See decisions in cases of Nannie Roach, 7 P. D., 80; Lettie Hawkins, 8 P. D., 22; Maria Merritt, 10 P. D., 157, and Mary Riddle, *Ibid.*, 441.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 8, 1902.

Eliza J. Ellis filed in the Pension Bureau on September 7, 1898, an application for pension under the provisions of the third section of the act of June 27, 1890, as widow of George Ellis, deceased, late private, Company H, One hundred and fourteenth United States Colored Volunteer Infantry, alleging the death of said soldier on March 4, 1891, leaving her without other means of support than her daily labor.

Said application was rejected on October 7, 1898, upon the ground that the claimant was not the widow of the deceased soldier and not entitled to pension as such under the provisions of said section. From said action appeal was taken on June 20, 1899.

The deceased soldier and the appellant were colored persons and slaves, residing with and upon the plantation of their owner and master in the State of Arkansas until the year 1863. Some time in 1862 they were married in Arkansas with the consent of their master and according to the custom of slaves, and in the spring and summer of 1863 they were brought by their master to Frankfort, Ky., and lived and remained with him in that place as his slaves until the enlistment of the soldier in the Army in June, 1864, and the emancipation of the appellant by the adoption of the thirteenth amendment of the Constitution of the United States. After their emancipation from slavery the appellant and the deceased soldier continued to live together as husband and wife in Frankfort, Ky., up to the time of the soldier's death, which is shown to have occurred upon the date alleged. It is admitted that the appellant and said soldier continued their matrimonial relations, relying upon and solely by virtue of the marriage performed according to the custom of slaves that had taken place and been consummated between them while slaves in the State of Arkansas, and they took no steps whatever after their emancipation to ratify or legalize said slave marriage in the manner required by the laws of the State of Kentucky.

It is earnestly contended by the appellant that the validity and legality of her marriage to the deceased soldier, and her status as a pensionable widow under the act of June 27, 1890, must be determined and decided under the provisions of the pension laws of the United States and not under the laws of the State of Kentucky, and that the slave marriage of herself and the deceased soldier, and their subsequent continuous cohabitation as husband and wife up to the date of his death, fully met and complied with the requirements of section 4705, Revised Statutes, relative to the proof of marriage necessary in the

cases of claimants for pension as the widows of colored or Indian soldiers.

The provisions of section 4705, Revised Statutes, by their express terms relate exclusively to the proof of marriage required of widows of such colored and Indian soldiers and sailors as "have died, or shall hereafter die, by reason of wounds or injuries received, or casualty received or disease contracted, in the military or naval service of the United States and in the line of duty." It is immaterial whether these words are construed as exclusive of all other colored and Indian claimants for widows' pension than those mentioned or merely as designating the class of such widows pensionable under the law at the time said statute was passed. In either event the result is the same, since they unquestionably apply only to the widows of colored and Indian soldiers and sailors whose deaths have resulted from the causes named, and can not be held to apply to the widows of colored and Indian soldiers and sailors whose deaths are not due to such causes without a forced and unnatural construction of said statute, and the injection therein of something that the language of said section does not express or warrant.

The claim for pension of this appellant as the widow of the deceased soldier is made under the provisions of the third section of the act of June 27, 1890, wherein the death of the soldier from causes incurred or contracted in line of duty during his military service is not a basis of pensionable title; and it is not alleged, contended, nor proved that the soldier's death had any connection whatever with his military service. Consequently, it necessarily follows that the appellant is not one of the class of widows described in section 4705, and the provisions of said section have no application to her or to her claim for pension.

The second section of the act of August 7, 1882, provides as follows:

That marriages, except such as are mentioned in section 4705, Revised Statutes, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage, or at the time when the right to pension accrued.

This statute unquestionably applies to and governs and controls the proof of marriage in pension cases in every instance, and applies alike to all classes of applicants for widow's pension except such marriages as are mentioned in section 4705. The marriages mentioned in section 4705 are the marriages of the widows of colored and Indian soldiers and sailors whose death has resulted from causes incurred or contracted in line of duty during service, and no others. Consequently the marriage of this appellant and the deceased soldier must, necessarily, be proved to have been a legal marriage in accordance with the provisions of the second section of the act of August 7, 1882.

By the act of August 7, 1882, Congress has seen fit to adopt and make the law of the place where the parties resided at the time of

marriage, or at the time when the right to pension accrued, the law by and under which a marriage shall be proven to be a legal marriage in all pension cases, except such marriages as are specifically described and designated in section 4705, and by virtue of said act the *lex loci* becomes and is the Federal law, or law of the United States, for that purpose in all such cases.

This appellant and the deceased soldier were married when slaves in the State of Arkansas, and under the laws of that State said marriage was absolutely void and without any legal force and effect. They were removed by their master to the State of Kentucky as slaves, where the same conditions obtained, and continued to reside in that State until the time of the soldier's death, when, if at all, this appellant's right to pension accrued. During the time that they were slaves they could not contract a valid and legal marriage in Kentucky, and the statute of that State of February 14, 1866, which was the law of the place where this appellant resided when her right to pension accrued, provided that in order to ratify and legalize subsisting slave marriages after emancipation they should appear before the clerk of the county court of their then residence and declare that they have been and desire to continue living together as husband and wife, and a record should be made of such declaration and a certificate thereof issued to the parties making the same. Upon failure to comply with the requirements of this statute, it was decided by the supreme court of Kentucky (*Estell v. Rogers*, 1 Bush., 62) that a slave marriage, such as existed between this appellant and the deceased soldier, was absolutely void and of no legal force or effect in that State. From the date of the passage of said Kentucky statute of February 14, 1866, up to the date of the soldier's death in March, 1891, a period of nearly thirty years, the appellant and the deceased soldier could at any time, by complying with the simple and easily understood requirements of said act, have rendered their union, entered into during slavery, a valid legal marriage under the law, and the status of this appellant as the widow of the soldier would have been perfect and unassailable. They failed and neglected to do this, however, and if now, by reason of said neglect and the appellant's failure to comply with the requirements of the law under which she was living, she finds it impossible to establish a legal marriage with the deceased soldier, and to show that she is his pensionable widow under the provisions of the act of June 27, 1890, the fault is her own. The misfortune which follows is due to her neglect, and can not be charged to the Bureau of Pensions, nor to this Department, whose duty it is to execute the laws as they appear in the United States statutes.

It is manifest, from the foregoing and from the cases cited below, that under the provisions of the second section of the act of August 7, 1882, which control in this case, this appellant can not be recognized

as the widow of the deceased soldier for pensionable purposes under the third section of the act of June 27, 1890, and is not entitled to pension as such widow thereunder. (See decisions of this Department in the cases of Nannie Roach, 7 P. D., 80; Lettie Hawkins, 8 P. D., 22; Maria Merritt, 10 P. D., 157, and Mary Riddle, *ibid.*, 441.)

The rejection of appellant's claim for widow's pension under the third section of the act of June 27, 1890, upon the ground stated was correct, and is affirmed.

DIVISION OF PENSION—ACT MARCH 3, 1899—CONSTRUCTION OF STATUTES.

ELIZABETH COOPER *v.* JOHN M. COOPER.

The portion of soldier's pension forfeited to his wife by reason of his desertion, under the first proviso of the act of March 3, 1899, is one-half the pension "due or to become due" him after his statutory desertion of six months subsequent to the passage of the act and during the continuance of said desertion. It is only the pension owing or accruing during the period of statutory desertion that is to be divided.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 8, 1902.

John M. Cooper, late private, Company C, Sixteenth Kentucky Infantry, appealed, May 20, 1901, from the Bureau action of August 16, 1900, allowing the deserted wife's claim (certificate No. 433043) of Elizabeth Cooper, filed March 30, 1900, under the act of March 3, 1899, and awarding her one-half of his pension on the ground that pensioner had deserted her, she being a woman of good moral character and in necessitous circumstances.

This appeal was docketed (No. 68919), and dismissed May 31, 1901, for lack of proof of service of a copy of the appeal on the appellee.

Service having been made, the appeal was reinstated November 4, 1901, and docketed as of No. 71954.

Pensioner contended in his original appeal that he did not desert claimant, but that she refused to live with him, although he was ready and willing to live with and support her.

He also contended that his wife had been paid \$52.40 of his pension in excess of the amount she would have been entitled to under the law if desertion was established; that this amount was one-half of arrears of pension allowed as due him on his increase claim prior to the passage of the act of March 3, 1899.

In a supplemental appeal filed July 24, 1901, pensioner, by his attorney, waives all that portion of his appeal except so much as embraces the question of the payment of the \$52.40, and insists that a palpable mistake was made in the payment of said sum to his wife.

The Bureau reported October 19, 1901, as follows:

The contention of the attorney that there were \$52.40 paid to the wife on an increase claim which was allowed subsequent to the allowance to her of one-half the pension, is held by this Bureau to be unsound, and has been denied.

The act of March 3, 1899, provides that one-half the pension due or to become due the pensioner shall be paid to the wife. This pension money was due subsequent to the allowance of the wife's claim, and was therefore paid to her, in accordance with the terms of the law.

It appears from the face brief in the wife's claim for division of pension that her claim was adjudicated August 16, 1900.

It appears from the face brief in soldier's invalid increase claim, that his claim was adjudicated August 10, 1900, or six days prior to the adjudication of his wife's claim, when pensioner was allowed an increase from \$24 to \$30 per month from November 30, 1898.

The only portion of soldier's pension forfeited to his wife by reason of his desertion, under the first proviso of the act of March 3, 1899, is one-half of the pension "due or to become due" him after his statutory desertion of six months subsequent to the passage of the act, and during the continuance of said desertion.

The language of so much of said first proviso as designates the pension to be divided between the pensioner and his wife is as follows:

That in case a resident pensioner of the United States shall for a period of over six months desert his lawful wife, she being a woman of good moral character and in necessitous circumstances, or, if he have no lawful wife, shall desert his legitimate minor child or children under 16 years of age, or his permanently helpless and dependent child, the Commissioner of Pensions is hereby directed, upon being satisfied by competent evidence of such desertion, to cause one-half of the pension due or to become due said pensioner during the continuance of such desertion to be paid to the wife.

The question presented by this appeal turns upon the construction to be given to the words "pension due or to become due" as used in said first proviso.

The word "due" has various meanings. At times it signifies a simple indebtedness without reference to the time of payment; at others it refers to the date of payment, or that the date at which payment should be made has arrived or passed. As stated by Story, J., in the case of *United States v. State Bank of North Carolina* (6 Peters, 36), in construing the phrase "the debt due to the United States shall first be paid."

What debt is here referred to? A debt actually payable to the United States or a debt then arising to the United States whether then payable or payable only in the future? We think the latter is the true construction of the term of the act. The whole difficulty arises from the different senses in which the term "due" is used. It is sometimes used to express the mere state of indebtedness, and then is equivalent to owed or owing. And it is sometimes used to express the fact that the debt has become payable.

and after citing illustrations the court reached the conclusion that the word "due" was plainly synonymous with owing.

As held in the case of *Wiggin v. K. of P.* (31 Fed. Rep., 125)—

The word "due" unlike "arrear" has more than one signification, and expresses two distinct ideas. At times it signifies a simple indebtedness without reference to the time of payment. At other times it shows that the day of payment has passed," citing the case of *Scudder v. Coryell* (5 N. J. Law, 340).

In the three provisos in said act of March 3, 1899, for the division of pension under three different sets of circumstances, Congress has used three different forms of expressing their intention as to the amount or sum of pension which was to be divided with the wife. The language in the first proviso is "one-half the pension due or to become due said pensioner during the continuance of said desertion." In the second proviso the language is "one-half of his pension accruing during his residence therein," i. e., in a State Home. In the third proviso the language is "one-half of the pension drawn in his behalf or to which he may become entitled during his residence therein," i. e., a National Soldiers' Home.

It is believed that the intention of Congress, as evidenced by the foregoing language of the three provisos, was to limit the pension to be divided with the pensioner's wife or children, to the amount accruing during the period while he was in desertion, or during the periods in which he resided in a State Home, or was an inmate of a National Home, and that it was not the intention to include any pension accruing prior to the commencement of the established statutory desertion, or prior to the time when he became a resident or inmate in a State or National Home.

The Department is further of the opinion that the words "due or to become due" in the first proviso are used with reference to a simple indebtedness and not with reference to the time of payment, and that the word "due" is synonymous with owing.

It therefore follows that arrears of pension or pension accruing or covering a period prior to the commencement of desertion under said act of March 3, 1899, would not be included in the phrase "pension due or to become due," and could not be legally divided with the wife.

As the wife of the pensioner in this case was paid one-half of a certain increase of pension accruing prior to said statutory desertion, and prior to the passage of said act, such payment was unauthorized by law, and should be paid the pensioner.

The action appealed from is accordingly reversed.

NAVY PENSIONS—SECTIONS 4715, 4756, AND 4757, R. S.

ELIZABETH SOUSA (WIDOW.)

Antonio Sousa, the deceased musician, was, in 1879, allowed a money benefit of \$19.50 per month by the Secretary of the Navy, under section 4756, Revised Statutes. Said money benefit was paid by the Commissioner of Pensions under the provisions of said section until May, 1885, when it was withheld, for the reason that said musician was then allowed a pension under the act of July 14, 1862, said withholding continuing up to the death of said musician, in 1892. His widow applied to the Commissioner of Pensions for payment to her of the sum so withheld, and said application was rejected in 1895, upon the ground that she was not entitled in law to file the same, said musician having never filed any such claim in his lifetime. On appeal to this Department said action of rejection was affirmed on August 22, 1901, upon the ground that "the widow has no title to a pension under section 4756, Revised Statutes, her husband having surrendered his title to pension under that section for a pension under the general law." Upon motion for a reconsideration of said departmental decision it is *Held*:

1. Although the money benefits granted by sections 4756 and 4757, Revised Statutes (section 6 of the act of March 2, 1867), are, in a general sense, pensions, they are not pensions in the usual and ordinary acceptance of that term, and were intended to be a "further provision for the support" of the beneficiaries thereunder in addition to pensions granted them by other laws. Section 4715, Revised Statutes, and the proviso to the second section of the act of June 27, 1890, prohibiting the allowance of more than one pension at the same time to the same person, constitute, therefore, no bar to the allowance of such money benefits to persons who are in receipt of pensions under other laws (John Spencer, 6 P. D., 167, and 7 P. D., 152; Richard Ewing, 8 P. D., 44; William Finley, 11 P. D., 410).
2. The money benefits granted by sections 4756 and 4757, Revised Statutes (section 6, act of March 2, 1867), are allowed by the Secretary of the Navy, who is, by the express terms of the law, the sole judge of who is entitled to receive them, and the Commissioner of Pensions acts in relation thereto in a purely ministerial capacity, and only as the authorized medium for the transmission or payment of such money benefits to the person certified by the Secretary of the Navy as entitled to receive them, his sole warrant for making such payments being the certificate of the Secretary of the Navy. The Commissioner of Pensions has therefore no authority in law to allow or to decide who are entitled to receive such money benefits, or to withhold the payment of the same from the persons who have been duly certified by the Secretary of the Navy as entitled thereto.
3. The withholding by the Commissioner of Pensions of the payments of the money benefit allowed to the deceased musician, Antonio Sousa, by the Secretary of the Navy, under section 4756, Revised Statutes, from the date of the commencement of the pension allowed him under the general pension law, was wrongful and without authority of law.
4. The question whether the widow of said deceased musician is entitled to apply for and receive said withheld payments as in the nature of accrued pension, or as assets of the estate of her deceased husband, is one which the Commissioner of Pensions has no jurisdiction or authority under the law to determine, but the decision of such question rests exclusively with the Secretary of the Navy, to whom application should be made.
5. The decision of this Department in this case of August 22, 1901, is hereby vacated and set aside.

6. The rejection by the Pension Bureau on April 22, 1895, of the application of the widow for the amount of the withheld money benefit allowed her deceased husband under section 4756, Revised Statutes, upon the ground that no claim therefor by the husband was pending at the date of his death was error, for the reason that the Commissioner of Pensions had no jurisdiction or authority to decide the question involved or to pass upon said application, and for the further reason that said ground of rejection was not applicable to the facts of the case, but the action rejecting said application is hereby affirmed upon the ground, however, that the Commissioner of Pensions had no jurisdiction or authority in law to hear or determine the same, and that said application should have been made to the Secretary of the Navy.
7. Order No. 380 of the Commissioner of Pensions, which was based upon the holding in the decision rendered in this case by the Department on August 22, 1901, and which is dated September 9, 1901, is hereby abrogated and annulled, and the Commissioner of Pensions will be governed in the payment of money benefits allowed by the Secretary of the Navy under sections 4756 and 4757, Revised Statutes, by the provisions of paragraphs 7 and 8, on page 85, "Practice of the Pension Bureau," and the practice thereunder which prevailed prior to the issuance of said Order No. 380.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
February 12, 1902.*

Antonio Sousa, late a first-class musician, United States Marine Corps, was in March, 1879, allowed by the Secretary of the Navy a money benefit under the provisions of section 4756, Revised Statutes, at the rate of \$19.50 per month from March 4, 1879, being "a sum equal to one-half the pay of his rating at the time he was discharged," and allowed him for twenty years' service in the Marine Corps, from March 23, 1854, to March 1, 1879, "in lieu of being provided with a home in the Naval Asylum, Philadelphia," and upon certification of these facts by the Secretary of the Navy to the Commissioner of Pensions a certificate was issued to him on April 9, 1879, entitling him to receive the above allowance.

On May 7, 1885, said musician filed in the Pension Bureau an application for invalid pension under the provisions of the general pension law, based on disease of lungs alleged to have been contracted in line of duty during his service in the Marine Corps. Said application for pension was admitted, and on April 24, 1886, his certificate was reissued to allow him pension under the general pension law at the rate of \$24 per month for disease of lungs, but the payments of the money benefit that had been allowed him by the Secretary of the Navy under section 4756, Revised Statutes, were withheld, and the amount of said money benefit that he had received from May 7, 1885, the date upon which said pension was made to commence, up to the date when his certificate was reissued was deducted, and no further payments of said money benefit were made to him, upon the ground that he was prohibited by the provisions of section 4715, Revised Statutes, from drawing two pensions.

The invalid pension of said musician under the general pension law was subsequently increased to \$30 per month from July 6, 1886, and to \$72 per month from April 10, 1890, and he continued in receipt of the same up to the date of his death, on April 27, 1892.

After the death of said musician his widow, Elizabeth Sousa, applied for and was allowed a pension under the provisions of section 4702, Revised Statutes, which she is now receiving.

On April 6, 1895, said widow filed in the Pension Bureau an application asking to be paid the amount of the money benefit that had been allowed her deceased husband under section 4756, Revised Statutes, the payments of which had been withheld from May 7, 1885, to the date of his death on April 27, 1892, as accrued pension.

This application of the widow was rejected on April 22, 1895, upon the ground that "no claim for pension under section 4756, Revised Statutes, by the deceased musician was pending at the date of his death, April 27, 1892, and the widow is not entitled to file a claim for the same."

From this action the widow appealed to this Department on April 14, 1899, and on August 22, 1901, said action was affirmed by a decision of that date, in which it was held, after briefly setting forth the facts in the case, as follows:

Section 4715, Revised Statutes, forbids the allowance of more than one pension at the same time to the same person.

The musician's allowance under section 4756 was paid out of the naval pension fund, but it was, nevertheless, a service pension, and he could not, under the law, receive that pension and one at the same time under the general law.

His widow, therefore, has no title to that which her husband could not legally receive.

On October 16, 1901, the widow filed a motion for a reconsideration of said departmental decision, contending therein that the holding of said departmental decision was contrary to the well-settled former ruling and holdings of this Department upon the question involved and to the law.

It will be observed, in the first place, that the holding of said departmental decision was not responsive to the appeal, nor did it review the ground upon which the application of the widow to be paid the amount of the allowance made to her deceased husband by the Secretary of the Navy under section 4756, Revised Statutes, which had been withheld and unpaid to him, was rejected. Said decision held merely that the provisions of section 4715, Revised Statutes, which forbid the allowance of more than one pension at the same time to the same person, were applicable to the money benefit allowed the deceased musician under section 4756, Revised Statutes, and that by accepting a pension under the provisions of the general pension law he had forfeited his right to payment of said money benefit from and after the date of the commencement of said pension.

The question thus passed upon had on several occasions been carefully considered by this Department in decisions in which a different conclusion was reached. In the preparation of the decision of August 22, 1901, this was overlooked. Examination of the same and of the reasons upon which they were based furnishes good ground for further consideration of the case under review, in which the question as to whether or not the allowances made by the Secretary of the Navy under sections 4756 and 4757, Revised Statutes, are pensions within the general and ordinary meaning and acceptance of that term as used in the pension laws, so as to preclude the payment thereof in addition to a pension granted under other laws, is again raised and presented for the consideration and the decision of this Department.

Sections 4756 and 4757, Revised Statutes, were originally enacted—aside from an immaterial amendment of December 23, 1885, including petty officers of the Navy and Marine Corps among the beneficiaries thereunder—as section 6 of the act of March 2, 1867, which is as follows:

SEC. 6. And be it further enacted, That to carry out the provisions of the eleventh section of the "Act for the better government of the Navy of the United States," approved July seventeen, eighteen hundred and sixty-two, directing the surplus income from the naval pension fund to "be applied to the making of further provision for the comfort of disabled officers, seamen, and marines," there shall be paid out of said fund to every person who, from age or infirmity, is disabled from sea service, but who has served as an enlisted person in the Navy or Marine Corps for the period of twenty years, and not been discharged for misconduct, in lieu of being provided with a home in the Naval Asylum, Philadelphia, if he shall so elect, a sum equal to one-half the pay of his rating at the time he was discharged, to be paid him quarterly, under the direction of the Commissioner of Pensions, and applications for such pension shall be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this act, shall certify the same to the Commissioner of Pensions, and said certificate shall be his warrant for making payment as herein authorized: *And provided further*, That any disabled person who has served in the Navy or Marine Corps as an enlisted man for a period not less than ten years, and not been discharged for misconduct, may apply to the Secretary of the Navy for aid from the surplus income of the naval pension fund; and the Secretary of the Navy is authorized to convene a board of not less than three naval officers, one of whom shall be a surgeon, to examine into the condition of the applicant, and to recommend a suitable amount for his relief, and for a specified time, and upon the approval of such recommendation by the Secretary of the Navy and certificate thereof to the Commissioner of Pensions, the amount shall be paid in the same manner as is provided in this section for the payment to persons disabled by long service in the Navy; but no allowance so made shall exceed the rate of a pension for full disability corresponding to the grade of the applicant, nor, if in addition to a pension, exceed one-fourth the rate of such pension. (14 Stat. L., 516.)

The provisions of the foregoing enactment appear in the Revised Statutes, in sections 4756 and 4757, as follows:

SEC. 4756. There shall be paid out of the naval pension fund to every person who, from age or infirmity, is disabled from sea service, but who has served as an enlisted person, or an appointed petty officer, or both, in the Navy or Marine Corps for the

period of twenty years, and not been discharged for misconduct, in lieu of being provided with a home in the Naval Asylum, Philadelphia, if he so elects, a sum equal to one-half the pay of his rating at the time he was discharged, to be paid him quarterly, under the direction of the Commissioner of Pensions; and application for such pension shall be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this section, shall certify the same to the Commissioner of Pensions, and such certificate shall be his warrant for making payment as herein authorized.

SEC. 4757. Every disabled person who has served in the Navy or Marine Corps, as an enlisted man, or appointed petty officer, or both, for a period not less than ten years, and not been discharged for misconduct, may apply to the Secretary of the Navy for aid from the surplus income of the naval pension fund; and the Secretary of the Navy is authorized to convene a board of not less than three naval officers, one of whom shall be a surgeon, to examine into the condition of the applicant and to recommend a suitable amount for his relief, and for a specified time, and upon the approval of such recommendation by the Secretary of the Navy, and a certificate thereof to the Commissioner of Pensions, the amount shall be paid in the same manner as is provided in the preceding section for the payment to persons disabled by long service in the Navy; but no allowance so made shall exceed the rate of a pension for full disability corresponding to the grade of the applicant, nor, if in addition to a pension, exceed one-fourth the rate of such pension.

The question whether the prohibition contained in section 4715, Revised Statutes, and the proviso to the second section of the act of June 27, 1890, against the payment of more than one pension to the same person for the same length of time, applied to the allowances made by the Secretary of the Navy, under the foregoing sections, and whether the beneficiaries under said sections could receive and enjoy said allowances in addition to a pension granted them by other laws, appears to have first been presented to and passed upon by this Department on December 16, 1892, in the case of John Spencer (6 P. D., 167), wherein it was held by Assistant Secretary Bussey that an allowance under the act of March 2, 1867, is not properly a pension, and a pensioner under the general law may also receive such allowance in addition to his pension.

Upon a review of the decision in this case by Assistant Secretary Reynolds, on December 23, 1893 (7 P. D., 152), it was held that, although the money benefits granted by sections 4756 and 4757, Revised Statutes, are pensions in a general sense, they are and were intended to be a "further provision for the support" of the beneficiaries therein specified, in addition to pensions granted by other laws, and that section 4715, Revised Statutes, and the proviso to the second section of the act of June 27, 1890, constituted no bar to the enjoyment of said money benefits, and were inapplicable thereto. At this time the questions involved were more exhaustively considered and discussed, and the Assistant Secretary states relative thereto as follows:

So much of section 4715, Revised Statutes, as concerns the case of Spencer reads: "Nothing in this title shall be so construed as to allow more than one pension at the same time to the same person." Substantially the same provision is found in the

acts of June 6 and July 25, 1866, and was in force at the date of the act of March 2, 1867, and has been ever since. (See also section 20, act of March 3, 1873; also, in this connection, Endlich on Interpretation, section 194, as to reenactments.)

The act of March 2, 1867, was passed, it must be conceded, with full knowledge by Congress as to existing laws. (Endlich on Interpretation, section 182.) As no intention to substitute the pensions therein provided for pensions granted by prior laws was expressed, none can be implied, and if both grants may subsist together both must be upheld. (Ibid.) The last clause of the act expressly recognizes the right of a beneficiary to pension under earlier laws and, when he is receiving such, provides what proportion this later allowance shall bear to the earlier.

But, as providing other concurrent pensions for the same person, this act was repugnant to the legislation above referred to as afterwards embodied in section 4715, Revised Statutes. As later conflicting legislation said act must be held to have superseded and impliedly repealed the previous inconsistent legislation, so far as its own execution was or is concerned, for contradictions can not stand together. (Ibid.)

Sections 4756 and 4757, Revised Statutes, are undoubtedly to be construed in *pari materia* upon the question under immediate consideration. It would seem to be a violent and forced construction to hold that Congress intended to grant an allowance in addition to other pension to men only who had served ten years and restrict that provided for those whose twice ten years of faithful service entitled them to larger consideration and reward, to such only as were not pensioned under other laws. Furthermore, the pension provided for the latter class could only be received by the few who might elect to take it in lieu of the larger provision of "a home in the Naval Asylum, Philadelphia." No one has ever claimed that pensions allowed to these seamen under other laws precluded the beneficiaries from the enjoyment of a home in the Naval Asylum, or the converse of this. Why, then, after granting the right of election as hereinbefore pointed out, should Congress curtail it by attaching the penalty of forfeiture to its free exercise by a pensioner under other laws? And why require a forfeiture only when the pensioner chose the "sum" which is the complement of the other provision for his comfort? Again, it was certainly intended to grant a larger allowance or pension, where that was chosen, for twenty years' service than for ten. Yet this purpose would be defeated if men of the latter class only could take the additional pension; and we might behold the incongruity of both classes, through a waiver of ten years of service by the former, upon an equal footing as to additional allowance.

If persons in the second class may take their "allowance" in addition to a pension under other laws, those of the first class are entitled to the "sum" or "pension" provided for them, likewise.

Attention is invited to section 4752, Revised Statutes (act July 17, 1862, 12 Stat. L. 607), to which reference has already been made, wherein, after providing a fund toward the payment of naval pensions granted by laws then existing, it is declared to be the purpose of Congress to make "further provision for the comfort of the disabled officers, seamen, and marines" by the use of "the surplus," if any, from such fund. The original grant which we are considering (section 6, act of March 2, 1867) was made in express furtherance of the above legislation. Whether or not it was the intention of Congress to confine the payments thereunder to the "surplus income" may admit of some difference of opinion. While it is not necessary to decide this question here, it is important to note the mention of this "surplus income," as evincing the intention of Congress to distinguish between pensions under this act and pensions under other laws, and to allow the former in addition to the latter.

It is well to note, also, in this connection, that exclusive jurisdiction as to the allowance of pensions under sections 4756 and 4757 is conferred upon the Secretary

of the Navy (21 Court of Claims, 298); also that the amendment of December 23, 1886 (24 Stat. L., 353), still further approves these additional pensions, regardless of section 4715, Revised Statutes.

The repetition of the quoted provision of section 4715 in the second section of the act of June 27, 1890, as a proviso can have no existence separate and apart from the provisions which it is designed to limit (Endlich on Interpretation, section 186), and that section has reference, evidently, to such pensions only as are subject to the jurisdiction of the Commissioner of Pensions. Considered as a reenactment, its repetition can not operate to repeal by implication or in any way effect the grant of pension by sections 4756 and 4757. (Ibid., section 194.)

The foregoing views and holding of the Department were again affirmed and cited with approval on September 19, 1895, in the case of Richard Ewing (8 P. D., 44), although the question we are now considering was not directly presented in that case; but in the more recent case of William Finley (11 P. D., 410) the ruling and decision of the Department in the case of John Spencer (*supra*) was reviewed and distinctly approved of and reaffirmed.

In this latter case, referring to the decisions hereinbefore cited, the Department says:

Reviewing these decisions, and the basis upon which the several points are settled therein, it is found that, except in a minor particular, they are sustained by the plain provisions of the statutes under accepted rules of construction as well as by sound reason and logic, so that additional elaborate comment is unnecessary to apply the rulings to the case at bar. That the provision of money in section 4756, Revised Statutes, for long and faithful service is a pension, to all intents and purposes, is hardly open to question; and the reasons for so regarding it, as stated in Spencer's case (*supra*), namely, that it is a gratuitous allowance and conforms to all the definitions of a pension, and that it is called a pension in the statute itself, outweigh any arguments against it. This money benefit is certainly not a debt due the beneficiary. It is based upon no sort of contract, and it can not be placed in the same relative position as retired pay to officers, because there is no provision of law analogous to that which provides for the latter. It is simply a manifestation of the bounty of the Government based on gratitude and appreciation of faithful service, as in the grant of all other pensions. It is only different from other pensions in that it has respect alone to the length of service of the beneficiary and his age or infirmity, and provides a specific sum for aiding in his maintenance, based on his pay while in active service, and does not place him in the category of those whose ratings are fixed by a schedule or dependent on some fact to be ascertained. It is as if a special act of Congress were passed in relation to each of such beneficiaries. The statute is, indeed, of the nature of a special act for a particular class.

Yet it is true that while, as a matter of fact, the money benefit provided by section 4756, Revised Statutes, is a pension, it is of a different order or class from those provided by other laws of general application; and because of this, as well as because the provision does not seem to exclude the beneficiary from the additional or concurrent benefit of such other laws, that it has been held his case is not affected by the prohibition of section 4715, Revised Statutes, which forbids the allowance of more than one pension at the same time to the same person. Indeed, the act of March 2, 1867, which included both sections 4756 and 4757, Revised Statutes, appears to expressly recognize the right of the beneficiaries thereunder to concurrent pension under other laws. If, then, this appearance of such recognition is not deceptive, and if the view that the statute is in the nature of a special act is correct, the prohibition of section 4715, Revised Statutes, does not apply, nor does that in the fifth section of the act of July

25, 1882, as follows: "That no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law."

Of this section it may be stated that the exception contained in the latter clause applies with especial force to the case under consideration. That is, the act of March 2, 1867 (a special act), under which pension is being received, "expressly states (or implies) that the pension * * * is in addition to the pension which said person is entitled to receive under the general law," namely, his Mexican war pension.

In addition to the above-cited reasons, which have heretofore led the Department to the conclusion that the provisions of section 4715, Revised Statutes, had no application to the money benefits granted by sections 4756 and 4757, Revised Statutes, and that said money benefits could be enjoyed by the beneficiaries entitled thereto in addition to a pension granted under other laws, it is manifest, from the express language used in said sections, that the Commissioner of Pensions is without any judicial authority to hear or determine any question relative to the allowance of said money benefits, or to decide the amount thereof or who may be entitled to receive the same, but stands in relation thereto in a purely and strictly ministerial capacity. Application for said money benefits under both of said sections must be made to the Secretary of the Navy, and he, and he alone, is charged with the duty, directly in the first instance and through a board of naval officers in the other, of determining who are entitled to receive the same, the amount to be received, and the length of time said money benefits are to be enjoyed by those he has found to be entitled to receive them under the provisions of the law. Upon certification of the fact that he has decided that a certain person is entitled to the money benefit provided by either of said sections, at a certain rate and for a certain time, the law provides that the same shall be paid to the person named in such certificate of the Secretary of the Navy under the direction of the Commissioner of Pensions, and such certificate shall be the warrant of the Commissioner for making such payment. It is clear from the language of the law that the Commissioner of Pensions is simply and solely the authorized medium through and by whom the money benefits provided by said sections are to be transmitted to the persons who have been decided by the Secretary of the Navy to be entitled thereto, and that he occupies no other relation to, and is vested by the law with no other authority over, said money benefits, and that no other duty, save that of payment of the money benefits as provided in said sections, is imposed upon him. The position of the Commissioner of Pensions relative to the money benefits granted by sections 4756 and 4757, Revised Statutes, is exactly analogous to that sustained by the agent for the payment of ordinary pensions to the Commissioner of Pensions. The pension agent is purely and simply a ministerial officer, whose sole duty

it is to pay the pensions that have been allowed by the Commissioner of Pensions in accordance with the certificate of pension issued to the pensioner by the Pension Bureau, at the rate and at the time therein specified, and said certificate of pension is his warrant for making said payments. He has no jurisdiction, authority, or power under the law to alter or change the amount of said pension, or change the date of its payment, or to withhold or suspend the payment of the same, unless so directed by the Commissioner of Pensions by whom the pension was allowed. So, in this instance, the Commissioner of Pensions has no authority or jurisdiction to change the amount of the money benefits that have been allowed by the Secretary of the Navy under sections 4756 and 4757, Revised Statutes, or to suspend or to withhold the payment of the same, unless instructed so to do by the Secretary of the Navy, in whom is vested by the law the sole authority and jurisdiction to determine all such questions relative to said money benefits.

It is manifest that said money benefits were directed by Congress to be paid under the direction of the Commissioner of Pensions solely as a matter of convenience—to avoid the multiplication of accounts, to prevent confusion, and to simplify the method of paying such money benefits. The machinery for the payment of and accounting for allowances, or pensions of a similar character, had already been provided by law in the matter of ordinary pensions, and this machinery was under the direction and control of the Commissioner of Pensions. Congress, therefore, instead of providing a separate and distinct method of transmitting to the beneficiaries entitled thereto the money benefits provided by sections 4756 and 4757, Revised Statutes, directed, by the provisions of section 6 of the act of March 6, 1867, that they should be paid and accounted for under the direction of the Commissioner of Pensions in the same manner as ordinary pensions, as a mere matter of convenience. It is clear, therefore, that the only authority under the law that has jurisdiction to direct to whom said money benefits shall be paid, how long they shall be enjoyed, or to withhold, suspend, or withdraw the same, is the authority by which the same were allowed, namely, the Secretary of the Navy. It is true, in case it should come to the knowledge of the Commissioner of Pensions that any person was improperly or unlawfully receiving either of said money benefits, it would be proper for him to bring this state of facts to the attention of the Secretary of the Navy, that the latter could take such action as the circumstances of the case might warrant, but this would be the full extent of his duty or authority in the premises, and no duty is imposed upon him by the law in connection therewith except to cause the payment of said money benefits to be made to the persons certified to him as entitled thereto until otherwise instructed by the Secretary of the Navy.

It follows from the foregoing, as well as from the views and conclusions of the Department heretofore expressed, as hereinbefore set forth, and which are believed to be correct and sound in law, that the Commissioner of Pensions had no jurisdiction or authority in law to withhold the payment of the money benefit allowed the deceased musician, Antonio Sousa, by the Secretary of the Navy under the provisions of section 4756, Revised Statutes, not only for the reason that the provisions of section 4715, Revised Statutes, were not applicable to his case, and the fact that he had been allowed an invalid pension under the provisions of the general pension law constituted no bar to the receipt and continued enjoyment thereafter of said money benefit, but for the further reason that the question as to whether he could continue to receive said money benefit after a pension had been allowed him under the general pension law was one which, in this particular case, it rested solely with the Secretary of the Navy to decide.

As a matter of fact, if said musician, Antonio Sousa, were alive, and were himself applying for the payment of the amount of said money benefit that had been improperly withheld by the Commissioner of Pensions, it would be proper and the only course for him to apply to the Commissioner of Pensions for the payment of the same, since the latter is the official charged by the law with the duty of paying the same, and he had wrongfully withheld it. In such a case he would be simply asking the Commissioner of Pensions to pay him the amount which the Secretary of the Navy had certified he was lawfully entitled to, and which the law made it the duty of the Commissioner of Pensions to pay him upon such certification, and the Commissioner of Pensions would be required to make such payment. This was the state of facts presented by the cases heretofore passed upon and decided by this Department, as above cited herein, and this was the sole ground upon which this Department assumed jurisdiction in said cases, and the sole question decided therein was whether the Commissioner of Pensions had authority to withhold the payment of money benefits allowed by the Secretary of the Navy under sections 4756 and 4757, Revised Statutes, from the persons certified by him as entitled thereto.

In the present case a different state of facts is presented. Here the musician, Antonio Sousa, is dead. He never applied to the Commissioner of Pensions for the payment of the money benefit that had been allowed him by the Secretary of the Navy under section 4756, Revised Statutes, and which had been withheld from him as aforesaid, but his widow, Elizabeth Sousa, now applies for the payment of the same to her. This money could only be paid to the widow by the Commissioner of Pensions under the provisions of section 4718, Revised Statutes, or the act of March 2, 1895, as accrued pension, but it would seem by a parity of reasoning to that employed by the Department, in the cases hereinbefore cited, in arriving at the conclusion that the

provisions of section 4715, Revised Statutes, did not apply to the money benefits allowed by the Secretary of the Navy under sections 4756 and 4757, Revised Statutes, that the provisions of law relating to the payment of accrued pension likewise had no application to these money benefits. It follows, however, from what has already been said, that this question is one which must be left for the decision of the Secretary of the Navy.

Acting, as he does, with reference to said money benefits in a purely ministerial capacity, the Commissioner of Pensions can only pay the same to the person named in the certificate of the Secretary of the Navy as entitled thereto. He has no jurisdiction or authority to pay said money benefit to any other person, nor to determine to whom such money benefit shall go upon the decease of the person named in the certificate of the Secretary of the Navy. The certificate of the Secretary of the Navy is made, by the express terms of the law, his sole warrant for making such payments. In the present case the Commissioner of Pensions has the certificate of the Secretary of the Navy to pay a certain money benefit, allowed under section 4756, Revised Statutes, to one Antonio Sousa, and to no one else. This money benefit not having been paid, Sousa, if alive, might very properly apply to the Commissioner of Pensions for the payment of the same, and the certificate of the Secretary of the Navy would be his warrant for making such payment, but he has no certificate from the Secretary of the Navy to pay said money benefit to Elizabeth, the widow of said Sousa, or to anyone else except the person named in said certificate, and would have no warrant in law for making such payment. It is clear, therefore, that the question whether or not the widow of the musician Antonio Sousa is entitled to receive the amount of the unpaid money benefit that had been allowed him under section 4756, Revised Statutes, either as accrued pension due her deceased husband or as part of the assets of his estate, is one the decision of which is vested by the law in the Secretary of the Navy, and one which the law gives the Commissioner of Pensions no authority or jurisdiction to decide. Application on the part of said widow to be paid said withheld money benefit should, therefore, have been made to the Secretary of the Navy, and by applying for the same to the Commissioner of Pensions she has manifestly mistaken her remedy.

From what has preceded it is evident that in the decision of the Department in this case of August 22, 1901, due consideration was not given either to the peculiar nature of the questions involved or to the decisions of the Department that had previously been rendered in similar cases or to the reasons underlying and leading to said decisions, and it was erroneous. The decision of August 22, 1901, is hereby vacated, and will hereafter not be taken or accepted as authority upon the matters therein involved and decided. The ruling in the cases of

John Spencer (7 P. D., 152) and William Finley (11 P. D., 410), hereinbefore cited, is adhered to.

The ground stated by the Pension Bureau for the rejection of the application of the widow of Antonio Sousa for the amount of the withheld money benefit allowed her deceased husband under section 4756, Revised Statutes, was likewise manifestly erroneous for several reasons: In the first place, said ground of rejection was not responsive nor applicable to the facts of the case. Said application of the widow was rejected because no claim by the deceased musician for the money benefit granted by section 4756, Revised Statutes, was pending at the date of his death. Said musician had made a claim for said money benefit to the Secretary of the Navy, which had been allowed, and he had been certified to the Commissioner of Pensions as entitled to the payment thereof. It would have been neither necessary nor proper for him to have filed another claim for said money benefit with the Commissioner of Pensions, who would have had neither authority nor jurisdiction to have heard or determined the same; and it having been determined that the payment of said money benefit had been unlawfully withheld from said musician by the Commissioner of Pensions, it was not necessary for him to have filed a claim therefor. In the second place, it follows from what has hereinbefore been stated that the Commissioner of Pensions had no jurisdiction or authority in law to pass upon and decide said application of the widow, since the exclusive jurisdiction to decide who is entitled to receive said money benefit and to whom the same shall be paid is vested by law in the Secretary of the Navy, and the Commissioner of Pensions had no certificate from him authorizing the payment of said money benefit to the widow of said musician, and had no warrant for the payment of the same to her.

It therefore does not necessarily follow that the rejection of said application of the widow was erroneous because a wrong and inapplicable ground for said action was stated. Said application should have been dismissed upon the ground that the Commissioner of Pensions had no jurisdiction or authority in law to hear and determine the same or to grant the relief asked, and for the reason that said application should have been made to the Secretary of the Navy, and upon the grounds now stated, the action rejecting said application is hereby affirmed.

Upon September 9, 1901, the Commissioner of Pensions issued Order No. 380, which was approved by the Acting Secretary of the Interior on September 10, 1901, and which is as follows:

Chiefs of Divisions:

On August 22, 1901, the Assistant Secretary of the Interior, in the case of the widow of Antonio Sousa, first-class musician, U. S. M. C., certificate No. 2595, held that—

"Section 4715, Revised Statutes, forbids the allowance of more than one pension at the same time to the same person.

"The musician's allowance, under section 4756, was paid out of the naval pension fund, but it was, nevertheless, a service pension, and he could not, under the law, receive that pension and one at the same time under the general law."

It is, therefore, ordered, that hereafter pension shall not be allowed under the provisions of section 4756, Revised Statutes, covering periods over which beneficiary is in receipt of a pension under any other law, and vice versa. Claimant or pensioner will be fully and clearly advised of his rights in each case and be afforded an opportunity to elect under which law he will take the pension.

Where a pensioner is now drawing pension under section 4756 and under some other law, he will immediately be advised as to the law in the premises, and his rights thereunder, and be given thirty days to elect under which law his pension shall be continued, and upon receipt of his election certificate shall issue in accordance therewith.

If pensioner fails to elect under which law pension shall be continued after the expiration of thirty days from receipt of notice, or before case is reached for final action, reissue will be made to allow him pension under the law conferring the greater benefit, and payment under other laws will cease.

Paragraph 7, on page 85, of A Treatise on the Practice of the Pension Bureau, approved by the Secretary of the Interior on April 9, 1898, is hereby abrogated.

The foregoing order, having been directly based on the holding of the Department in the decision of this case of August 22, 1901, is manifestly erroneous, and therefore the same is hereby abrogated and annulled.

Prior to the issuance of said Order No. 380, the practice of the Pension Bureau in the payment of the allowances made by the Secretary of the Navy, under sections 4756 and 4757, Revised Statutes, was governed by paragraphs 7 and 8, on page 85, of A Treatise on the Practice of the Pension Bureau, approved by the Secretary of the Interior on April 9, 1898. Said paragraphs are as follows:

7. Where a sailor is pensioned under the provisions of section 4756, Revised Statutes, for twenty years' service at one-half the pay of his rating at the time he was discharged, and he has also established a claim for pension under the general law for disability contracted in service and line of duty, or under the act of June 27, 1890, a certificate will issue consolidating such pensions, and he will be entitled to receive the allowance granted under said section, in addition to the pension granted him by this Bureau, either under the general law or under the act of June 27, 1890.

8. When the Secretary of the Navy shall certify to this Bureau, under the provisions of section 4757, Revised Statutes, that a person who has served ten years in the Navy or Marine Corps, is entitled to aid from the surplus income of the naval pension fund, in addition to a pension granted by this Bureau, either under the general law or under the act of June 27, 1890, not to exceed one-fourth the rate of such pension, a certificate will be issued covering both allowances for the period specified by the Secretary of the Navy.

These paragraphs, and the practice therein directed, being in harmony with the views of the Department as herein set forth, are hereby continued in force.

RES JUDICATA—EVIDENCE—FRAUD OR MISTAKE.

MINORS OF DANIEL M. EASLEY.

The service origin of the soldier's fatal disease having been admitted in the case of the widow after a special examination, the rejection of the minors' claim on the ground that the evidence was insufficient to establish such origin is held to have been error, no fraud, mistake of fact, or error of law being shown.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
February 14, 1902.*

The appeal filed March 8, 1901, in the case of the minors of Daniel M. Easley, deceased, formerly a soldier in Company H, Twenty-eighth Illinois Infantry, has been considered and the papers are herewith returned.

The soldier, Daniel M. Easley, was in the service, as above stated, from August 15, 1861, to March 15, 1866, and died June 28, 1880, of disease of the lungs. He never applied for a pension. His widow, who remarried in 1881, filed a claim under the provisions of section 4702 of the Revised Statutes, August 15, 1890, which was allowed in January, 1897, after a special examination, the service origin and continuance of the soldier's fatal disease being accepted. The widow's pension included increase on account of four children of the soldier who were under 16 years of age at the time of his death.

One of the children died in 1880. The other three were still under 16 years of age at the time the pension granted to the widow terminated, which was at the date of her remarriage—October 26, 1881. An application for pension was made by the minors, March 17, 1897, which was rejected by the Pension Bureau in November, 1900, on the ground that the evidence failed to show that the disease of lungs of which the soldier died was in any way due to his military service. From that action the appeal was taken, the contention therein being that the service origin of the soldier's fatal disease was established in the widow's claim.

No new facts have come to light since the widow's claim was allowed. Upon the same evidence the judgment of the Bureau in 1897 was that the origin of the soldier's fatal disease in the service was proved, and in 1900 that it was not proved, and because of this difference of opinion the minors are denied pensionable rights while the title of the widow has been conceded.

The evidence has been examined with sufficient care to ascertain that it afforded reasonable ground for the judgment rendered in 1897 in the case of the widow. It is readily perceived that there might be an honest difference of opinion as to whether said evidence established the service origin of the soldier's fatal disease or not, but the question

having been adjudicated it should not, in the opinion of the Department, have been subsequently reopened in connection with the minors' claim. Public policy and a due regard for the rights of claimants require that there shall be, at some time, a final decision and an end to litigation. Where an invalid pensioner has died of some disease or disability for which he was pensioned, it would be a manifest hardship to require his widow to reopen and prove his title *de novo* in order to establish her own right to pension; and the same objections apply to requiring a minor to prove title in the widow. Not only would such a rule of practice work great hardship and injustice to claimants, but it would also greatly increase the work of the Bureau and resulting expense to the Government in the adjustment of claims.

Of course, where fraud is shown, or a plain mistake of fact, or error of law, the case would be different. But, in the absence of such showing, the Department is clearly of the opinion that a matter of fact which has been admitted as proved in the claim of a soldier or his widow should not be called in question under a subsequent application filed by the person who succeeds to his or her pensionable rights. The action appealed from is reversed and the claim of the minors remanded for your further consideration.

DEATH CAUSE—MURDER—ACT JUNE 27, 1890.

SUSAN SMITH (WIDOW).

Soldier's death was caused by claimant's voluntary, unlawful, and felonious act, for which she was indicted, tried, and convicted of murder, and was sentenced therefor to imprisonment for life, but was pardoned after serving twelve years. She is not, therefore, entitled to pension under the third section of the act of June 27, 1890, on account of the death of her husband caused by her own wrongful and unlawful act.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
February 17, 1902.*

David H. Smith, formerly artificer of the Twenty-third Battery, Indiana Light Artillery, died January 4, 1882, being at that time in receipt of a pension of \$6 per month, under the general law, on the ground of disability caused by rheumatism.

On September 15, 1896, his widow, Susan Smith, filed application for pension under the act of June 27, 1890. This application your Bureau rejected, July 27, 1899—

on the ground that as the claimant, by the willful murder of the soldier, created the condition of widowhood, she is without title as widow, within the meaning of the act of June 27, 1890, which contemplates only the widowhood which results from involuntary and natural cause, and never that which is self-created by the unlawful and murderous act of the claimant.

From this action the claimant, on August 28, 1899, filed an appeal, alleging as follows:

We submit that the action of rejection is error in that it is insufficient in law. The claimant has not been convicted of murdering the soldier, nor even, it appears, indicted therefor. Until conviction we submit that it is improper and illegal to charge her with the willful murder of the soldier. It is also submitted that the action of rejection is error because it has not been shown that the widow killed the soldier for the purpose of creating title to pension in herself . . . The Government is limited to the determination of the question of motive, and may not withhold pension for sentimental reasons, or as punishment for crime, in case the motive for the act was independent of any design to defraud the Government or to create title to pension.

From the record it appears that on July 19, 1886 (shortly after the action of your Bureau, on June 30, 1886, directing the payment of arrears of pension of said David H. Smith to his widow), her attorneys wrote to your Bureau a letter of inquiry, commencing as follows:

Upon receipt of your office notice of the allowance of the claim of David H. Smith, deceased, certificate No. 333243, made payable to his widow, Susan Smith, we have requested the United States pension agent at this city to withhold payment a few days, that we may receive your decision after the following information shall have been given you. We furnished your office with evidence showing that said Smith was murdered. We are now informed that said soldier's body was found in a well, that suspicion fell upon the widow, now the beneficiary of this pension, and two sons. They were indicted, tried in the Wayne County, Ind., court, found guilty of the murder, and said widow is now serving a life sentence in the Indiana female prison.

Upon her subsequent release from said prison the widow applied for a pension in her own right; thereupon your Bureau assigned the case to a special examiner for investigation. Among other testimony taken by him was the deposition of Charles E. Wilson, made June 3, 1899, as follows:

I am 42 years of age; my post-office address is Indianapolis, Marion County, Ind.; occupation, private secretary to the governor of Indiana. As such I have custody of the pardon records. I now have before me the record of the pardon of Susan Smith from the Indiana Woman's Reformatory, which shows that she was convicted, in May, 1882, in Randolph County, Ind., of the crime of murder, and sentenced to imprisonment for life, and was pardoned September 21, 1894, by Governor Claude Matthews, for the reason, "Believe she has been sufficiently punished."

There appears to be sufficient evidence of the indictment, trial, and conviction of the claimant upon the charge of the murder of her husband; also, that after undergoing twelve years of imprisonment she was pardoned, not because of subsequent discovery that she was innocent of the crime, but because it was the opinion of the governor that she had been sufficiently punished.

Whatever may have been the motive that prompted the murder in this case, to allow the widow a pension would be in effect permitting her to reap the advantage of her wrong and putting a premium on murder. No reason appears for disturbing the action of your office, which is accordingly affirmed.

MARRIAGE AND DIVORCE—EVIDENCE—PRESUMPTIONS.

ANNIE D. BURGOYNE (WIDOW).

The claimant proves her marriage to the sailor in 1888 and continuous cohabitation with him from that time until his death in 1895. The only reason for questioning the validity of said marriage lies in the fact that the sailor stated he had been previously married, but he also affirmed that his former wife was dead. No other evidence of former marriage or death of first wife can be obtained.

Held: That the mere possibility remaining, after all sources of information have been exhausted, that there was a former wife living in 1888 is not sufficient to defeat the prima facie title of the claimant based on record evidence of a ceremonial marriage followed by continuous cohabitation for a period of seven years.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
February 20, 1902.*

Herewith are returned the papers which accompanied your report upon the appeal in the case of Annie D. Burgoyne, who claims a pension under the act of June 27, 1890, as the widow of Alexander Burgoyne, deceased, formerly a sailor in the United States Navy.

It appears that the said sailor enlisted May 26, 1862, and was honorably discharged May 29, 1863. He died December 24, 1895, and was, at the time of his death, a pensioner under the general law on account of scrotal hernia of the left side. Some accrued pension due him at the time of his death was paid to Annie D. Burgoyne upon her application for the same as his widow. On January 15, 1896, she filed a claim for pension under section 3 of the act of June 27, 1890. This claim was rejected in March, 1899, after a special examination, on the ground that she was unable to show that she was the sailor's legal widow. From that action an appeal was taken by her attorneys, July 27, 1899.

The evidence shows that the claimant was married to the sailor by Rev. Thomas G. Addison, rector of Trinity Church Parish, in this city, April 9, 1888, and that they thereafter lived together continuously as man and wife until the sailor's death.

It is admitted that there was no bar to a legal union on the part of the claimant, but there is some testimony tending to show that the sailor had been previously married, and because no evidence can be obtained showing the death or divorce of the former wife the claim is rejected.

The claimant says she knew the soldier only about a year before they were married; he never told her he had been married before, and she heard nothing of a prior marriage until after his death.

The evidence as to said prior marriage consists of the affidavits of two persons who state that the sailor told them he had been previously married and that his former wife was dead.

One of these persons is the claimant's sister, Sallie Griffith, who says:

One time when my sister, the claimant, was sick, Mr. Burgoyne told me that he had had a former wife who had died of pneumonia. He did not tell me when she died nor where she had died. I remember he said she died somewhere where he could get no one to help take care of her, but I never asked him where it was they were living when his former wife died, and he never told me. No, sir, I never heard him say whether he had any children by his former wife.

The other witness, Michael Downey, says:

I knew Alexander Burgoyne before he married this claimant. He was then boarding at Dan. Henry's, this city (Alexandria, Va.). I knew nothing about him then, only that he claimed to have no wife. After he rented of me and lived in my house he used to say that this claimant was the only wife he had living—that he had been previously married and that his wife died in the West somewhere.

All efforts of the special examiners to learn something more definite as to the sailor's previous history and his alleged former wife have been in vain. We are confronted, then, with this state of facts:

1. A marriage between the claimant and the sailor in 1888, followed by cohabitation until the death of the sailor in 1895.
2. No reason for questioning the validity of said marriage, except the fact that he said he had had a former wife who was dead.

The case is similar to that of Carrie Peterson (11 P. D., 139), the facts and holdings in which are stated in the syllabus as follows:

Claimant's marriage to the soldier is shown by evidence of a ceremony and cohabitation. The only evidence of his prior marriage is the testimony of his sister and a friend to whom he wrote or disclosed that he had married a girl in a seaport while he was pursuing the occupation of sailor. His mere declaration, without other proof, is not competent to establish such a marriage to the prejudice of the rights of this claimant, and, on this point, her legal widowhood is considered established.

In the case of Jane McMahon, decided on appeal, June 27, 1895 (L. B., No. 178, p. 151), the Department held:

Where the only evidence of deceased soldier's prior marriage consists of statements of such fact, coupled with the further statement of death of the first wife prior to his second marriage, the whole statement must be taken together, as the true meaning and import can only thus be ascertained.

The general rule is that where a marriage, in fact, is shown it will be presumed to be valid in the absence of proof to the contrary. In the case of *Schnisseur v. Beatrice* (147 Ill., 210) the doctrine was stated by the court as follows:

Where a marriage has once been solemnized according to the forms of law every presumption will be indulged in favor of its validity. This presumption is so strong that a former husband or wife will be presumed to be dead after an absence of less than seven years. The ordinary presumption in favor of the continuance of human life is made to give way to the presumption in favor of the innocence of a second marriage.

The presumption of the death of the first wife in this case is strengthened by evidence of the sailor's repeated statements that she was dead

and by the fact that nothing has been heard of her up to the present time. In the opinion of the Department the mere possibility remaining after all sources of information have been exhausted, that the first wife may have been living in 1888, ought not to defeat the prima facie title of the claimant based on record evidence of a ceremonial marriage followed by continuous cohabitation for a period of seven years. The action of the Bureau is therefore reversed and the case remanded for further consideration. No point has been considered by the Department except that of marriage.

BOUNTY LAND—LOST WARRANT—SECTION 2444, REVISED STATUTES.

SISTER OF EZEKIEL LARKINS (DECEASED).

The validity of a warrant is not affected by the fact that the warrantee was dead at the date of the issue, and the decision in the case of the Heirs of Panter Laws (2 P. D., o. s., 291), and cited in Digest of 1897, page 67, which held that "a warrant issued after the death of the warrantee named therein is void," is hereby overruled.

The action appealed from in this case is reversed, the case reopened, and claimant will be afforded an opportunity to prove the loss of the warrant issued to the soldier February 26, 1852.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
February 20, 1902.*

Sophia E. McMillan, sister of Ezekiel Larkins, deceased, late private in the companies of Capts. Duncan Buie and McKenny Merr (or Mew), Florida Mounted Militia, in the Florida war, appealed July 3, 1899, from the Bureau action of July 23, 1893, rejecting her application filed April 26, 1893, for a land warrant alleged to be due her brother on account of his said service in the Florida war, on the ground that "no title vested in a sister."

It is contended that a bounty-land warrant was issued to soldier February 26, 1852, after his death; that said warrant never became a part of his estate and has ever been unknown to claimant, and she refers to the act of September 28, 1850 (sections 2436 and 2441, R. S.); act of June 3, 1860 (section 2443, R. S.); act of March 3, 1843 (section 2444, R. S.), and the act of June 3, 1858.

It appears that a bounty-land warrant (No. 30234) for 80 acres was issued to soldier under his application filed April 29, 1851, under the act of September 28, 1850, and sent to his attorney, V. Ellis, of Washington, D. C., February 26, 1852, which warrant had not been returned to the General Land Office up to December 3, 1901, as appears from a report of the Commissioner of that office of that date.

Notwithstanding that fact the warrant may be still in existence. There were 5,021 land warrants under said act of September 28, 1850,

outstanding and unlocated on June 30, 1901, as appears from the Annual Report of the Commissioner of the General Land Office, page 163.

The validity of said warrant is not affected by the death of the soldier prior to its issue, by reason of the act of June 3, 1858 (section 2444 of the Revised Statutes), which provides that—

When proof has been or hereafter is filed in the Pension Office during the lifetime of a claimant, establishing to the satisfaction of that Office his right to a warrant for military services, and such warrant has not been, or may not be, issued until after the death of the claimant, and all such warrants as have been heretofore issued subsequent to the death of the claimant, the title to such warrants shall vest in his widow, if there be one, and if there be no widow, then in the heirs or legatees of the claimant; and all military bounty-land warrants issued pursuant to law shall be treated as personal chattels and may be conveyed by assignment of such widow, heirs, or legatees, or by the legal representatives of the deceased claimant, for the use of such heirs or legatees only.

The decision in the case of the Heirs of Panter Laws (2 P. D., o. s., 291), and cited in Digest of Pensions and Bounty Lands (1897, page 67), which held that "a warrant issued after the death of the warrantee is void," is hereby overruled.

The question of the date of soldier's death, while immaterial as affecting the validity of the warrant, might be material for the purpose of showing that, in case he died prior to the issue of the warrant, he therefore could not have assigned it.

The exact date of his death is not definitely established, the witnesses having testified that he died in 1852.

As the warrant issued was valid, it devolves upon the claimant to prove its loss or destruction before a new warrant can be issued in lieu thereof under the provisions of section 2441, R. S.

It appearing that soldier's service entitled him to a warrant for 160 acres instead of 80, a warrant for the additional 80 acres was issued to claimant by Bureau action of October 7, 1895.

The Department is of the opinion that the evidence in this case did not justify the Bureau action of July 22, 1893, rejecting her claim on the ground stated, but that further evidence should have been called for, showing the loss or destruction of the warrant issued to soldier in 1852.

The action appealed from is accordingly reversed, the case reopened, and claimant will be afforded an opportunity to prove the loss or destruction of the warrant issued to soldier February 26, 1852.

SERVICE—ACT OF JUNE 27, 1890.

JOHN G. MULICK.

Appellant enlisted April 6, 1865, and served as landsman in the United States Navy until April 5, 1868, when he was honorably discharged, and under the circumstances in this case he is regarded as having served in the United States Navy for a period of ninety days during the war of the rebellion.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 26, 1902.

John G. Mulick, formerly landsman, United States Navy, filed a claim for pension April 26, 1897, alleging heart trouble, pains in back, and general debility, which was rejected August 9, 1899, in the following stated language:

Approval for rejection on the ground that claimant's service did not aggregate ninety days of actual service in the war of the rebellion, and therefore he has no title to pension under the act of June 27, 1890.

August 24, 1899, the claimant filed an appeal to the Department, contending that the action of the Bureau was erroneous under the law and the evidence in the case.

The second section of the act of June 27, 1890, contains the following provision:

That all persons who served ninety days or more in the military or naval service of the United States during the late war of the rebellion, and who have been honorably discharged therefrom, * * *

It will be seen that the issue raised by this appeal is whether the claimant had ninety days service during the war of the rebellion in the Navy of the United States.

In the case of John Barleyoung (7 P. D., 453) the following language was used:

It is a well-known historical fact that war was practically ended, so far as actual belligerency was concerned, in July, 1865 (case of Jeremiah Butler, 7 P. D., 214). Active hostilities then ceased, as they ceased, in the case of the Mexican war, on February 2, 1848, at the signing of the treaty (Instructions to the Commissioner of Pensions, 7 P. D., 240). The war still subsisted, however, and pensionable service may have been rendered thereafter, both in and during the war, until it was finally terminated as a status, which will be held in accordance with the decision of the Supreme Court, cited (The Protector, 12 Wallace, 700) to be August 20, 1866. But the question, in any case, whether service rendered was connected with the war, as part of its operations, is one of fact, and as such is governed, in proof, by legal presumptions the same as in other cases. In view of the fact that belligerent hostilities had ceased in July, 1865, it will, therefore be presumed that any service rendered after that time was not rendered in, although during the war of the rebellion, and the burden of proof is upon claimant to show by direct and positive evidence that the service rendered thereafter was a part of the operations of the war, and made for the attainment of the purpose declared in the proclamation of August 20, 1866, to have been finally obtained.

The records of the Navy Department in this case show the following regarding claimant's enlistment and service:

John G. Mulick enlisted April 6, 1865, and served as a landsman on the *Great Western* to April 10, 1865; on the *Naiad* to May 28, 1865; on the *Ouachita* to July 3, 1865; on the *Fair Play* to August 7, 1865; on the *Great Western* to August 24, 1865; on the *Oneota* and *Catawba* to September 30, 1865; at the Mound City Station to December 31, 1865, and on the *Grampus* to April 5, 1868, when he was discharged.

The records further show:

That the *Fair Play* was attached to the Mississippi flotilla until August 8, 1865 when put out of commission at Mound City, Ill.

It is clear that the facts in this case are essentially different from the Barleyoung case (*supra*) in that claimant enlisted prior to April 13, 1865, and in this regard differs from any published case of the Department. His enlistment and service will be presumed to have been in and during the war of the rebellion. (See the case of Franklin S. Cowen, 7 P. D., 374.)

In May, 1899, a reviewer of the Pension Bureau put the following slip in the case:

As claimant enlisted prior to April 13, 1865, there can be no doubt that he enlisted for the war, and as he served on the *Fair Play*, which was a vessel of the Mississippi flotilla, which was distinctively a war organization, organized and maintained for suppression of the rebellion, and for no other purpose, said service should be counted in reaching an aggregate of ninety days' service in the war of the rebellion.

It will be noted that this claimant was on the *Fair Play* until the day before it was put out of commission, and that he was on the *Ouachita* from May 26, 1865, to July 3, 1865, when he was transferred to the *Fair Play*. It is shown by the records that the *Ouachita* was in the Mississippi River off Jefferson Barracks July 1, 2, and 3, 1865.

It is conceded that from April 6, 1865, to July 1, 1865, the claimant served "during the war of the rebellion," but it is contended that any subsequent service was not for the purposes of such war. There is nothing in the case to show that the character of the service rendered by claimant in June, 1865, differed in any special manner from that rendered in July, 1865. He was under the same enlistment, commanded by the same officers, in the same locality, and performing the same duties. No authority has fixed a date when the war ended for all purposes as regards the Navy. It is true July 1, 1865, has generally, for pensionable purposes, been fixed as the date, but, as was stated in the Barleyoung case (*supra*), it is a question of fact which must be determined as each case arises. So in this case it is not intended that the present opinion shall be considered as removing the date of the ending of the war, for general pensionable purposes, to a later date than July 1, 1865, but it is concluded from the facts and circumstances in the case under consideration, aided by the presump-

tions of law to which they give warrant, that this claimant should be considered as serving more than ninety days during the war of the rebellion and entitled to pension under the act of June 27, 1890.

Accordingly the action of the Bureau is reversed, and the papers are returned for an adjudication of the claim in conformity with this opinion.

RERATING—PRACTICE—PATHOLOGY.

CASSILLY C. COOK.

The Bureau issued a certificate of pension at the rate of \$15 per month (three-fourths total of rank as captain) for "Disease of heart, result of typhoid fever," contracted during the recent war with Spain, to the appellant in this case, but refused to accept as established his allegation that he was also disabled by disease of nervous system (neurasthenia) as a result of such fever.

In the judgment of the Department, however, it is clearly shown from the facts presented, the evidence adduced, and the medical authorities cited that the nervous affection or neurasthenia which wholly disqualified the appellant for the performance of manual labor from October 25, 1898, the date of his discharge, to May 1, 1900, the date of the medical examination showing recovery from neurasthenia, was without doubt a sequel of the typhoid fever of service origin.

Held: That it would not be contrary to, or inconsistent with, any provision of law or rule of practice to rerate this claim so as to allow the second-grade rate during the time the appellant is shown to have been wholly incapacitated for the performance of manual labor by the sequelæ of typhoid fever, subsequent to the date of filing his application for pension.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
February 28, 1902.*

Herewith are the papers in the case of Cassilly C. Cook, late captain Company M, First Ohio Infantry (war with Spain).

This case has heretofore been considered by the Department on four separate occasions, both upon appeal and upon motions for the reconsideration of a decision of the Department affirming the action of the Bureau originally appealed from.

The appellant is now pensioned at the rate of \$15 per month (three-fourths of total of rank) for disease of heart, result of typhoid fever.

It appears from the record in the case that the pensioner was not satisfied with the rate allowed him when his claim was adjudicated, and that, without attempting to secure a rerating of his pension by the Bureau, he appealed directly to the Department from the action of the Bureau in the premises, contending that the testimony then on file in the case showed that during the period intervening between November 2, 1898, the date of filing his original declaration for pension, and March 25, 1900, the date on which he left a sanitarium at which he had been treated during a greater portion of such period, he

was so ill from the effects of typhoid fever that he required the regular and constant personal aid and attendance of another person; and that he was consequently entitled to the \$72 rate for the said period of sixteen months and twenty-three days, but that no change in the existing rate of \$15 per month was asked for the time subsequent to the date of his discharge from the said sanitarium.

The Department held, however, in the consideration of the foregoing contentions, that although the testimony in the case all tended to show that the appellant did suffer from some disease of his nervous system subsequent to his muster out of the military service, which disease was evidently due to the attack of typhoid fever in the service, the said evidence, as well as the claimant's own admissions, clearly showed that the disease in question was of a temporary character, covering a period of about sixteen months, which fact alone barred the appellant from the benefit of the provisions of the act of March 4, 1890, the specific terms of which require that the degree of disability shall not only be total, but that it shall also be permanent in such degree before the rate therein provided can be allowed.

The appellant readily appreciated the force of this argument, and admitted that he was in error in contending for either the \$72 or the \$50 rate; but, in a motion filed October 19, 1900, asked for the reconsideration of his aforesaid appeal and the decision promulgated thereon August 3, 1900, under the provisions of the act of March 3, 1883, which provides, among other things, that all persons who have become so disabled as to be incapacitated for the performance of manual labor by reason of disabilities incurred in the military or naval service of the United States shall receive a pension at the rate of \$30 per month. And it was contended in such motion that the degree of disability from which the appellant was suffering during the period heretofore referred to comes clearly and fully within the purview of the act of March 3, 1883.

After due consideration of the said motion and the requests therein preferred, the Department remanded the papers in the case to the Bureau with the following statement:

It does not appear that the question as to the rate allowed during the period mentioned by the pensioner has been considered by the Bureau, and as his statements relative to his inability to perform manual labor during the time mentioned appear to be sustained by the evidence which was on file in the case when the present rate was allowed, the claim was returned to the Bureau for consideration of said evidence and for a report on the contention of the appellant.

In compliance with directions of the Department, as above set out, the Bureau submitted the following report, dated January 23, 1901:

A motion for a reconsideration of the adverse decision of the Department in this case has been filed and the papers have been returned for a further consideration of the evidence and a report on the contention of the appellant.

The contention in the original appeal was to the effect that the claimant had been wholly disabled by nervous prostration, etc., and required aid and attendance from November 2, 1898, the date of filing his claim, to March 25, 1900, the date on which he left a sanitarium where he had been under treatment for some months, and that he was therefore entitled to the rating of \$72 per month during that period. In the motion for reconsideration it is contended that at least second grade should be allowed over said period.

The Department states: "It does not appear that the question as to the rate allowed during the period mentioned by the pensioner has been considered by the Bureau," and adds that "his statements relative to his ability to perform manual labor during the time mentioned appear to be sustained by the evidence which was on file in the case when the present rate was allowed."

It will be observed, however, that the claimant merely alleged in his original declaration that he had "contracted typhoid fever causing disease of heart and general debility." This declaration was executed November 1, 1898, one week after his discharge from the service. On October 25, 1898, the date of discharge, Dr. H. E. Twitchell, the assistant surgeon of the regiment, certified: "Has just recovered from typhoid fever and is in a debilitated condition. Recovery perfect." On October 28, 1898, Dr. James T. Whittaker stated that he found the claimant that day "affected with subacute myocarditis, probably the sequel of typhoid fever," and he added as a postscript: "In my opinion, Captain Cook should be sent to a convalescent hospital for a month or two." There was therefore no evidence that nervous prostration existed at or immediately after the claimant's discharge from the service, and he made no claim on that account. In an affidavit executed January 10, 1899, Dr. J. F. Boylan, who was second lieutenant in the claimant's company during its service, testified that the claimant had contracted typhoid fever, "very much disabling him at the time, and affecting his heart before discharge," he believed, but he stated nothing as to the claimant's condition after his discharge.

The claim appears to have been reached in its order for adjudication in April, 1899, when the first calls were made for evidence. A medical examination was ordered in September, 1899, but the claimant's notice was returned "unclaimed." Another examination was ordered at his own special request in December, 1899, before the board at Alma, Mich., where he then was in a sanitarium, but he failed to appear for the examination and has furnished no explanation except that he "was unable to appear," although it is shown that he remained continuously at said sanitarium from about October 9, 1899, to March 25, 1900. The first and only official examination of this claimant was made by a board of surgeons on May 1, 1900, eighteen months after his claim was filed, in this city, where it appears he has since resided and engaged in the practice of his profession as a lawyer.

The report of this official examination showed some increase in the area of cardiac dullness and a systolic bruit; there was no cyanosis, dyspnea, or edema. The board further stated: "Is active in mind, and body is well nourished. Muscles fairly firm. * * * Is not tremulous. No arcus senilis. Skin smooth and elastic. Does not suffer from general debility."

Upon this report and in accordance with the legal approval the rating of \$15 per month (three-fourths of a captain's total) was allowed for disease of heart result of typhoid fever. The alleged general debility was rejected on the ground that it was "not shown since filing," meaning thereby that a considerable degree of permanent disability therefrom had not existed. Moreover, it is not the practice to approve for general debility under the general law even where it is apparently shown; its cause is determined and the approval and rate are made therefor.

The pensioner is evidently satisfied with the amount of his rating since March 25, 1900, when he left the sanitarium. His contention is, as already noted, to the effect that he was entitled during "a period of sixteen months and twenty-three days" to

a higher rating. He does not contend that this higher rating was justified by the disease of heart for which he was pensioned but by the nervous prostration—an affection which he did not allege in his declaration, was of uncertain origin and only temporary. For these very reasons, evidently, the question as to the allowance of a higher or additional rating was not presented or considered.

The "debilitated condition" referred to by the surgeon at the time of the claimant's discharge, when recovery from typhoid fever was "perfect," and the "general debility" alleged as one of the results of typhoid fever, did not, evidently, refer to this affection of the nervous system, because the contemporary testimony does not show that said affection existed at that time. Further, it is not satisfactorily shown by the testimony subsequently filed that this affection had any real relation to the attack of typhoid fever.

Nearly all of this testimony appears to have been prepared and typewritten by the claimant or under his supervision, and this was done, apparently, after April 25, 1900, when he personally called up his claim. There are several discrepancies to be noted in the testimony. For example, while Dr. Whittaker only certified on October 28, 1898, that he found subacute myocarditis, in his affidavit (as prepared) he is made to state that on said date the claimant was "in a greatly debilitated condition, mentally and physically, requiring constant medical attention, and the attendance of nurses." The correspondence filed with the case shows that about the time Dr. Whittaker signed this affidavit he was or had been seriously ill. The conflicting dates are also numerous.

From this reconsideration, however, there seems to be a possibility that the temporary affection of the nervous system had some relation to the attack of typhoid fever. If this were established an additional rating for a short period would be warranted. But, as already shown, there are grave doubts and marked discrepancies in the way. It is therefore recommended that the case be referred for a thorough special examination to determine the actual facts and the merits of the contention. The several affiants should be cross-examined, transcripts of the hospital and sanitarium records should be secured, and particular inquiry should be made as to the claimant's mental and nervous temperament prior to enlistment and from time to time subsequent to his discharge. The probability of other exciting or etiological factors should be investigated.

The Department approved of the suggestion in the foregoing report as to the propriety of having a special examination held in the case with a view to determining "the actual facts and merits of the contentions" of the appellant, for which purpose the papers in the case were remanded to the Bureau March 8, 1901, with instructions that when the reports of the special examiners had been received and duly considered all of the papers in the case, together with a statement as to the conclusions reached by the Bureau in the light of the new evidence adduced upon special examination, should be retransmitted to the Department. These instructions were complied with July 29, 1901, and report made as follows:

The reports of the special examination in this case have been examined. While they do not fully clear up the discrepancies as to dates and facts, it is believed they may be accepted as the basis for action upon the present point in contention—that is, the claim for rerating from November 2, 1898, the date of filing, to March 25, 1900, the date on which the claimant left the Alma Sanitarium the second time.

In the first place it will be noted that there is no established authority for a rerating over such a period as is claimed in this case. Under the regular practice any

rating allowed from the date of filing, or from the date of discharge, must continue at least to the date of the first medical examination. According to the claimant's statements that he is satisfied with his present rating from March 25, 1900, it is evident that a rerating can not be allowed for the period from the date of filing to May 1, 1900, the date of the medical examination. Should it be determined, however, as contended, that a higher rating is warranted for the shorter period to March 25, 1900, a rating in excess of the officer's total should not be allowed, for it has been held by the Department that "disabilities must be permanent in order to receive a grade rating." In fact, the Department on August 3, 1900, affirmed the action of the Bureau in this case on the ground of the temporary character of the disability on which the contention for the rating of \$72 was based.

While it appears that the claimant suffered from a condition of neurasthenia for some time after the attack of typhoid fever, which is shown by the record, it is not clear that the condition was an immediate sequel thereof or that it is wholly attributable to that cause. The testimony of the claimant's brother, Clifford, and that of Dr. Rowe and others, indicate that he was worried by business responsibilities. The brother, Clifford, stated that he thought another brother, Theodore, had worried the claimant. Theodore was not a witness or deponent in the case, and it is unfortunate that his statement was not secured. Moreover, although temporary the nervous trouble was not continuous in any definite degree during the period in contention. The claimant stated before Special Examiner Grannis that doubtless in the early part of 1899 he tried to prepare some cases for trial. This indicates that he was not wholly disabled. A marked outbreak of nervous trouble seems to have occurred in the spring of 1899, and in August or September of that year "acute mania" developed.

In my opinion the rating allowed was approximately commensurate with the average extent of permanent disability fairly attributable to the claimant's military service.

The Department, however, did not fully concur in the conclusions of the Bureau, as above set out; but—after carefully considering the various phases of the case, as affected by the law, the established practice in analogous cases, and the evidence on file, especially that adduced upon special examination—concluded that, in view of the fact that but one medical examination had been made of the soldier since his original declaration was filed, and the conditions described in the certificate of such examination were not satisfactory, another medical examination of the appellant was advisable. And the papers in the case were, accordingly, on September 14, 1901, again remanded to the Bureau with the request that the pensioner should be ordered before some board other than the one by which he had theretofore been examined.

The idea in having another medical examination made of the appellant was, primarily, to secure a more definite and satisfactory description of the condition of his heart, as it was then thought that if the facts revealed at the said test medical examination justified such action a rerating that would be entirely satisfactory, both to the pensioner and to the Government, might be granted for disease of heart alone, and thus avoid an action in the premises that would involve a more or less radical departure from the established methods of adjudicating claims of this character.

It was stated, however, in the aforesaid departmental communication

of September 14, 1901, remanding the papers in the case for another medical examination of the appellant, that:

Although the act of March 3, 1883, does not state in terms that the degree of disability warranting the allowance of the second grade rate must be permanent in such degree, it has, however, long been held that it was not the intent of the said act to provide the rate in question for a condition of varying intensity and of indefinite existence. And while it has not been the practice to make an approval for a certain sequence of an established cause for a more or less indefinite period, increase the rate during such period, and then eliminate said sequence from the approved pensioned cause or causes and reduce the rate accordingly, it is, nevertheless, believed that it would not be contrary to, or inconsistent with, either the law or practice to vary such practice in cases where the alleged relation of cause and effect between certain disabilities can be clearly traced and the time involved in the case under consideration is sufficiently long to justify a temporary change in rate, and its duration can be satisfactorily determined from the facts presented.

It is stated in the recent report of the Bureau in the premises—dated July, 29, 1901—that should it be determined that a higher rating is warranted from date of filing to March 25, 1900, a rating in excess of the officer's total should not be allowed. In this view the Department would fully concur, except in so far as the period for which such higher rating should be allowed is concerned, were the disease of heart the only cause of disability to be considered. And it is for this reason that the Department is of the opinion that a careful and thorough medical examination should be made of the appellant's heart. Besides which it would be very unusual to change a rate of pension from any date other than the date of a medical examination, or the date of some act of Congress expressly providing for such change in rate. Furthermore, the appellant's supposed satisfaction "with his present rating from March 25, 1900," as per said report of the Bureau, has nothing to do with the case—an appellant's satisfaction or dissatisfaction with whatever rates may be adjudged as proper not being regarded as sufficient to determine the question at issue in any case—such questions being determined by the facts presented.

In a brief of the case only recently filed the appellant contends that inasmuch as he was treated in private hospitals or sanitariums during the greater part of the time intervening between November 2, 1898, the date of his discharge, and May 1, 1900, the date on which he was examined by a board of United States examining surgeons, for "nervous prostration" (neurasthenia), resulting from the typhoid fever accepted as of service origin: which neurasthenic condition wholly disqualified him for the performance of any professional or manual labor, he should have been allowed the second grade rate for such period of time.

It does not appear that the Bureau has ever definitely passed upon this phase of the case, and it is by reason of this fact that it is desired by the Department that when the report hereinafter directed to be made is submitted it shall embrace a full and explicit statement as to whether or not the aforesaid neurasthenia can, in the judgment of the medical referee, be accepted as a sequence of the enteric fever.

The appellant was not examined pursuant to these instructions until December 7, 1901, as he was temporarily absent from the country at the time the order for such examination was first issued.

The findings of the examining surgeons at this examination were to the effect that the area of cardiac dullness was increased downward and toward the sternum; rhythm irregular and force diminished; systolic bruit over the mitral valve, other valves normal; mitral stenosis

with hypertrophy of left ventricle: no dilatation, œdema or cyanosis, but dyspnoea after exercise.

There was no evidence of any disease of the central nervous system. The mental condition of the pensioner was "first class," and his memory was unimpaired. No history of any form of paralysis or of paresis was obtained, and there were no disturbances of the special senses.

The following additional report of the Bureau, dated December 24, 1901, was submitted with the return of the papers in the case to the Department, as directed:

The instructions of the Department dated September 14, 1901, included a request for a test medical examination to be made with special reference to the condition of the claimant's heart.

These instructions also call for an additional report, in the light of the findings of the examining surgeons, first, upon the question of the propriety of the present rate of pension, and, second, as to whether the alleged nervous prostration or neurasthenia may properly be accepted as a result of the typhoid fever of service origin.

The test examination was made on December 7, 1901, by the board at Madisonville, Ohio, and their report is now in the case. It is proper to state that the delay in securing the examination was not the fault of the Bureau, but was due to the frequent change of residence of the claimant.

The examining surgeons at Madisonville, Ohio, evidently made a thorough physical examination of the claimant, as shown by their certificate. In rating for the pensioned disability, disease of the heart, they recommend fifteen-eightieths, and state "Heart rating is given for rank of captain."

After a careful review of the description of the heart's condition, as shown by this report, and considering the same in connection with the rating recommended, it is my opinion that the present rate, \$15 (three-fourths of a captain's total), is adequate for the disease of heart result of typhoid fever for which this officer is pensioned.

Respecting the etiology of the alleged nervous prostration or neurasthenia, alleged to have been a result of the typhoid fever, and for which an additional pension is claimed during an intermediary period of about sixteen months, it was stated in the medical opinion from this Bureau, dated July 29, 1901: "While it appears that the claimant suffered from a condition of neurasthenia for some time after the attack of typhoid fever, which is shown by the record, it is not clear that the condition was an immediate sequel thereof or that it is wholly attributable to that cause." Then follow references to certain portions of the testimony tending to support the position of the Bureau on this question.

There is no reason now to change or modify the above-quoted opinion. It is perfectly clear from the test medical examination, from the supplemental report by Special Examiner Grannis, filed December 4, 1901 (made in response to a telegram from the honorable Commissioner), and from much other testimony in the case that this claimant is not now a sufferer from neurasthenia. No new evidence has been filed since July 29, 1901, which will aid the Bureau in arriving at a more definite conclusion on the question of the etiology of the alleged temporary neurasthenia.

As will be observed, the Bureau is still undecided as to the propriety of accepting the alleged neurasthenia as a pathologic sequel of the typhoid fever of service origin, but is unable to suggest any other probable factor in the etiology thereof, except the fact that the testimony of one of the appellant's brothers and of several other affiants in

the case indicate that he was worried by business responsibilities. Relative to this phase of the question, the appellant says:

It is proven these did not exist in fact, were purely imaginary, and proof of claimant's impaired mental and physical condition. Prior to said typhoid fever when claimant in fact had "business responsibilities," it is proven claimant was able to assume them without worry.

It is not impossible—or, indeed, improbable—that the claimant did worry more or less about his business affairs subsequent to his muster out from the service, as it is shown by the evidence in the case that prior to his enlistment he was actively engaged in the practice of his profession as a lawyer; but, from the large amount of reliable medical evidence on file as to his mental condition immediately after his discharge, and the opinions expressed by the physicians who gave such evidence as to the probable cause of the conditions referred to, it would seem much more probable that his "worry" was due to, instead of the cause of, his said mental condition. Furthermore, in a given case, where an efficient, recognized, and demonstrable cause of an existing condition is clearly established, it seems useless to search for some other and much less efficient factor in the production of such condition, especially one that is, at best, but theoretical. At any rate, a factor that is regarded as wholly sufficient to have caused the conditions complained of in this case having been fully established, it can not be outweighed by a theory that is wholly suppositious, or, as the appellant has suggested, purely imaginary. In other words, "an ounce of fact is worth a pound of theory."

It must not be understood, however, that the Department intends—by the foregoing statements in regard to the alleged "worry" by the claimant over business responsibilities—to question for one moment the correctness of the views of the various writers and recognized authorities upon diseases of the nervous system as to business worries and anxieties, long-sustained mental efforts, or great mental shock being possible predisposing or exciting factors in the etiology of certain neuroses. What was said applies wholly to the question at issue in the case at bar, as such case is to be determined in accordance with the facts presented in the case and the most recent and enlightened views of the medical profession as to the pathology of typhoid fever.

In a communication dated September 2, 1901, the appellant says, in part:

Claimant does not ask a grade rating of \$72 per month, but an additional \$15 per month from November 2, 1898, to May 1, 1900. The Department's affirmation, August 3, 1900, of the Bureau's action does not bear on claim now submitted for intermediary rerating. The medical referee's citations of law are wholly irrelevant to the issue presented. No legal technical obstacles prevent the consideration of this claim under the act of March 3, 1883, which act is clearly applicable in determination

of this claim. The question then presented is, Is claimant entitled to rerating at \$30 per month from date of filing pension claim November 2, 1898, to date of medical examination May 1, 1900? Does the testimony adduced warrant such rerating? Careful reading of the 26 affidavits submitted, the Department's special examination of a number of the affiants, prove conclusively claimant contracted typhoid fever in the United States volunteer service; at time of muster out of service, November 25, 1898, he was suffering from typhoid's sequelæ; that continuously thereafter to time of medical examination, May 1, 1900, he was by reason of said sequelæ of typhoid—namely, severe heart affection and nervous prostration—totally disqualified for the performance of manual and professional labor, was under the care and attention of physicians and trained nurses at a necessary expense of nearly \$1,400. While said original affidavits were ex-parte testimony, the Bureau's special examination fully corroborates all material statements therein. All of claimant's affiants are certified to by the special examiners as of "good" or "excellent" reputation. J. T. Whittaker, M. D., deceased, late president American Medical Association, Joseph Ranschhoff, M. D., F. R. C. S., Brooks F. Beebe, M. D., and Joseph T. Boylan, M. D., are men of preeminent standing and reputation. * * *

All affiants concur in essentials in all the material facts in the sum and substance of this claim, namely, that claimant contracted typhoid in the service; that he suffered severely from the sequelæ thereof for nearly twenty-one months thereafter; that he was totally unable by reason thereof to perform manual and professional labor; that he was almost continuously under the needful care of physicians and trained nurses, incurring great expense therefor; that May 1, 1900, he was found by the Government's medical examination suffering from typhoid sequelæ, and so late as July, 1901, he has been compelled to engage medical services in treatment for heart weakness, result of said typhoid fever. All these indisputable facts bring the case clearly within the provision of the act of March 3, 1883, and warrant rerating from November 2, 1898, to May 1, 1900, at rate of \$30 per month, which rerating is respectfully asked.

The essential features of the appellant's statement that he was almost continuously under the care of physicians and trained nurses for a period of nearly twenty-one months are quite fully corroborated by the ex parte evidence on file in the case, but it is believed that the statements of some of the affiants are more or less exaggerated.

In a brief of his case submitted October 19, 1900, the appellant says in part:

The abundant, indisputable testimony presented in said claim No. 1003247 consists of the evidence of eight of Cincinnati's foremost physicians, four other prominent physicians, two of whom were in the United States service, the medical superintendent of College Hill, Ohio, Sanitarium, the medical superintendent and assistant medical superintendent of the Alma, Mich., Sanitarium and nurses and attendants, proving conclusively total disability during the periods stated. Said testimony is summarized as follows:

Appellant contracted typhoid fever while serving as captain in said volunteer service at Fernandina, Fla., August 5, 1898, was taken some days later to United States hospital, Fort Thomas, there a patient, and treated by United States surgeons and nurses until discharged October 1, 1898.

It is conclusively proven by testimony of James T. Whittaker, M. D., Julius Eichberg, M. D., Joseph E. Boylan, M. D., all practicing physicians of Cincinnati, from their personal professional medical examinations of appellant at time of said discharge and during four weeks thereafter, that he was but partially convalescent from said typhoid fever, in no condition, by reason of mental and physical debility result-

ing therefrom, to leave said hospital, and that his constant medical care and attention thereafter by physicians, nurses, and attendants was absolutely necessary.

The testimony of Dr. Williams, medical superintendent of College Hill Sanitarium, Ohio, where appellant was taken for treatment upon advice of said physicians, testifies to appellant's complete mental and physical prostration, total helplessness, and the necessity for regular and constant attendance upon him of nurses and attendants. E. S. Pettyjohn, M. D., medical superintendent of Alma Sanitarium, Michigan, and his medical assistant, H. J. Thompson, M. D., of said sanitarium, establish beyond question that during entire period of nine and one-half months this appellant was a patient in said sanitarium; he was under the daily, constant, and necessary care and attention of said medical superintendent and his medical assistant and was subject to daily and constant therapeutical and other approved medical treatment for complete nervous exhaustion and mental and physical disability resultant from said typhoid contracted as aforesaid. The testimony of nurses—namely, United States nurse Rhoads, J. H. Bates, jr., Edward G. Overbeck, and others who nursed and attended this appellant—that he was wholly and totally incapacitated and helpless from typhoid disease contracted in the service and line of duty and required their regular personal aid and attendance; the evidence of Mrs. Col. James M. Schoonmaker and Clifford S. Cook, both of Pittsburg, Pa., sister and brother respectively of appellant; the testimony of Dr. Griess of the Cincinnati hospital, Brooks F. Beebe, M. D., formerly United States marine surgeon, Cincinnati, John W. Leonard, M. D., Arthur D. Weakley of Washington, D. C., Dr. Zenner, Dr. Frank H. Rowe of Cincinnati, and others, corroborated in every detail and particular the testimony of before-mentioned deponents as to the total disability and helplessness during said period from typhoid contracted in the service and line of duty as aforesaid.

Testimony herein proves appellant prior to said typhoid fever was naturally of strong constitution, robust health, of industrious temperate habits, mental and physical condition unimpaired, a member of the Ohio bar in active practice; had held numerous responsible private and public trusts, among the latter the presidencies of the Ohio State Board of Pardons, the Cincinnati Board of Park Trustees, the Ohio Club; that he individually recruited two companies of 106 enlisted men each for the First Ohio Volunteer Infantry in the late war and commanded one company; has been totally incapacitated for all manual and professional labor from date of contracting said typhoid fever, August 5, 1898, to March 15, 1900, and that he continuously has been under regular care of physicians and nurses.

And in a subsequent memorandum, filed November 30, 1901, he said:

The objection made by the Department in this case is that the official examination taken some time after the discharge of the officer shows him entitled to no more than the rate which he is now receiving. He claims for an intermediary period to be entitled to not less than \$30 a month, and proves this claim by evidence of the most convincing character, showing that he was totally disabled from the performance of manual labor, and that he required the regular attendance of another person during a large part of the time from the date of filing his claim until some months before the date of examination.

It is admitted that even if his disability was such as to be equivalent to that for which a pension of \$72 a month is paid, he can not get this rate because his disability is not permanent, and the act granting the \$72 rate requires a permanent disability. It is also admitted that he is not entitled to a \$50 rate, although his disability is clearly equivalent to that for which this rate is given, because that act established an official examination as the only method of determining the disability, and as the date from which the pension at this rate begins. The act establishing the rate of \$30 contains no such restriction; the pension is given for an existing disability; no

rule of evidence is established in the law, and there is no provision that it must be permanent. The evidence clearly shows that his disability was equivalent to that for which \$30 is paid. On this point the evidence is full and clear. Had he been examined when his claim was filed, this rate of disability would have been established, and he would have been pensionable at this rate, but at a lower rate for the period beginning when he had progressed partially toward recovery.

The case thus resolves itself simply into a question of evidence. The evidence of his title to this pension is complete and convincing. He is denied the pension simply because the evidence is the testimony by affidavit and upon special examination of private physicians. The insistence by the Department so far is that his degree of disability can be established only by an official examination, which is impossible to be had, as the time has long since passed about which the contention is made. The question has been raised whether any precedent can be found for fixing the rate of disability without an official examination. There are thousands of such granted. Claims were filed in great numbers just prior to the expiration of the limitation of the arrears act in 1879 and 1880. Under these claims pension was allowed from 1865 to 1880, while the first examination was held in 1880 or 1881. Under these circumstances the only way in which a rating was given was by the evidence of private physicians and neighbors. This rule is followed in thousands of cases, and all that is asked in the present case is that the same rule be followed. It is strictly parallel. The fact that here a rating of \$30 a month is claimed makes no difference, as the law granting that rate is in no wise different from the law granting lower rates, except as to the degree of disability to be established by the evidence.

As above shown, and as hereinbefore stated, the appellant no longer contends for either the \$72 or the \$50 rate, but does claim that he is entitled to the second-grade rate from the date of filing claim to the date on which he was first examined by a board of examining surgeons.

The testimony as to his condition during the period involved in his present contention is quite voluminous, but scarcely needs referring to in detail, as much of it is merely corroborative of that which is deemed of the most importance in determining the question at issue in the premises.

Some of this testimony, however, will be set out quite fully, while other portions of it will be referred to but casually.

Joseph E. Boylan, who served in the same company and regiment as the pensioner, testified in an ex parte affidavit as follows:

Joseph E. Boylan, being duly sworn, deposes and says: That he is a graduate of the Ohio Medical College, with degree of M. D.; that he is and has been in the active practice of medicine in the city of Cincinnati, Ohio, for the past fourteen years; that he has had personal and intimate acquaintance with Charles C. Cook, late captain Company M, First Ohio Volunteer Infantry, for fifteen years, during which period by reason of constant association he was perfectly familiar with the physical and mental condition of said Charles C. Cook. That he served as second lieutenant of said company M in the late Spanish-American war from about June 25, 1898, until muster out of First Ohio Volunteer Infantry October 25, 1898. That from said June 25 until about August 5, 1898, as second lieutenant of said company, he was in daily constant contact with said Cook. That on or about said last date said Cook was stricken with typhoid fever while in the United States Volunteer service at Fernandina, Fla., where he remained seven days in the hospital of the brigade. That during said seven days this affiant daily visited said Cook in connection with Surgeon-Major Knowles and Captain-Surgeon Weaver of said brigade.

That during said seven days said Cook had a varying temperature from 101 to 103 and was constantly confined to a cot in a tent which comprised a part of said hospital in the encampment of said brigade about $3\frac{1}{2}$ miles east of Fernandina, Fla. That on or about the 15th day of August, 1898, this affiant, upon order of Col. C. B. Hunt, First Ohio Volunteer Infantry, took said Cook to Fort Thomas, Ky., hospital, arriving there August —. That he remained at said hospital and visited said Cook daily for ten days thereafter. That upon said journey from Fernandina to Fort Thomas said Cook was completely prostrated mentally and physically from the effects of said typhoid fever and under affiant's constant care and treatment. That he was wholly unable to partake of other than light liquid diet, unable to walk, and was conveyed by ambulance from said Fernandina hospital to railroad train in Fernandina and from depot in Cincinnati by ambulance to Fort Thomas, Ky., hospital. Affiant says that on or about the 17th day of September he again visited said Cook in Fort Thomas, Ky., hospital and found him in a somewhat convalescent condition. That on October 1, 1898, he was informed Cook was discharged from said hospital. That affiant saw him upon that day and for several days thereafter at Christ Hospital, Cincinnati. That from his examination of said Cook he gives it as his firm professional opinion that said Cook had not sufficiently recovered to be discharged from said hospital. That he was, upon said October 1 and thereafter, while in Christ Hospital, Cincinnati, wholly unable to care for himself, was under the constant charge and attention of physicians and nurses, and wholly unable to perform any manual or professional labor as an attorney.

That about October 6 this affiant, after consultation with physicians and careful examination of said Cook, took him to Washington, D. C., and obtained order for his transfer to hospital at Fort Monroe, Va. Affiant took said Cook to said hospital October 9 or 10, remained with him two days, then returned to Cincinnati. Affiant says he next saw said Cook at the St. Nicholas Hotel, Cincinnati, on or about October 23. That said Cook was then wholly disqualified, by reason of the effects of said typhoid, to perform any manual labor, give any attention to the details of the muster out of said Company M, or to attend same at First Regiment Ohio National Guard Armory, Cincinnati, upon October 25, 1898. That several days thereafter said Cook, confined by sickness at said St. Nicholas Hotel, was taken again to Old Point Comfort.

Affiant says he again saw said Cook, a patient at the Grande Hotel, Cincinnati, during the period from about December 21 to 24, 1898. He gives it as his professional opinion, from examination of said Cook, that he was then physically and mentally disqualified for the performance of any labor.

Affiant says that from said last-named date to about April 15 he has, upon several occasions, seen said Cook, namely, during the month of August and early part of September, 1899, in Cincinnati. That during the dates mentioned said Cook was still suffering severely from effects of said typhoid, was wholly disqualified for the performance of manual or professional labor, in greatly debilitated condition, physically and mentally, suffering from nervous prostration and acute melancholia. Affiant says he last saw said Cook in Cincinnati, between April 10 and 15, 1900. That Cook had greatly improved, and was, in his opinion, becoming restored to former health. Affiant says that prior to said Cook's sickness, August 8, at Fernandina, and at the time of his muster into the volunteer service, about June 25, 1898, and for fifteen years prior thereto, he was a strong, robust man, physically and mentally. That in his professional opinion the long and continuous sickness he has suffered was due wholly to the contraction of typhoid while in said service, as heretofore mentioned. That on October 1, 1898, he was in no condition for discharge from said Fort Thomas, Ky., hospital, and that his long and severe illness thereafter was due to said premature discharge. Affiant now holds chair of laryngology and otology in Laura Memorial College in Cincinnati and member of the staff of Presbyterian Hospital.

In a subsequent deposition before a special examiner Dr. Boylan testified practically to the same effect as in his said original affidavit.

Gertrude W. Rhoades testified as follows:

Gertrude W. Rhoades, being duly sworn, deposes and says: She is a regularly educated trained nurse, a graduate of the Newport, R. I., hospital, and served the United States Government as such trained nurse in the care and treatment of United States regular and volunteer officers and soldiers in the late Spanish-American war. That in her capacity as a regularly educated trained nurse in the regular hospital service of the United States Government at Fort Monroe, Va., during months of October and November, 1898, she treated and cared for in her said capacity Charles C. Cook, then captain of Company M, First Ohio Volunteer Infantry, a patient at said place suffering from the sequelæ of typhoid fever.

Affiant says that said Cook by reason thereof was completely prostrated and enfeebled mentally and physically, was wholly disqualified for any manual or other labor, required the constant care and attention of nurses and attendants, was suffering from high fever and temperature, extreme nervousness and insomnia, for which latter ailment he was given drugs in the endeavor to produce sleep.

Dr. Herbert E. Twitchel, of Hamilton, Ohio, who served as assistant surgeon of the appellant's regiment, testified before a special examiner that he treated the latter while at Fernandina, Fla., in August, 1898, for malarial fever, but does not remember treating him for typhoid fever. The rest of his deposition is characterized principally by an almost entire absence on the part of deponent of any personal knowledge of the subsequent condition of the claimant.

The records of the War Department show that the appellant "was treated in regimental hospital, August 9, 1898, for remittent malarial fever; in line of duty;" and that he was "admitted to general hospital, Fort Thomas, Ky., August 18, 1898, with typhoid fever, in line of duty." The officer may have had malarial fever as well as typhoid fever, but it is not improbable that the diagnosis of malaria was error, and that he really had typhoid as early as August 9, 1898. However, this is immaterial, as it is established beyond question that he actually had typhoid fever while in the service.

Relative to his condition before enlistment and immediately after discharge, Dr. James T. Whittaker, deceased, formerly of Cincinnati, Ohio, testified as follows:

Affiant says that he has had an intimate personal acquaintance with Charles C. Cook, late captain Company M, First Ohio Volunteer Infantry, for ten years last past; that on or about June , 1896, as medical examiner for the Connecticut Mutual Life Insurance Company, he made careful medical examination of said Cook for a \$10,000 policy in said company; that he found said Cook in all respects well and sound mentally and physically, and recommended him to said company as an unusually good and safe risk, and that said company thereupon accepted said Cook for insurance in said amount, which was thereafter increased to \$15,000.

Affiant says he has occasionally treated said Cook professionally for slight ailments; that prior to August 8, 1898, said Cook, to his personal and professional knowledge, was a sound, strong man, physically and mentally, well qualified for the performance of manual and professional labor as an attorney; that on or about October 1,

1898, he made careful examination of said Cook in said city, and found him suffering from subacute myocarditis, suffering great physical and mental exhaustion, and was totally disqualified for the performance of manual or professional labor, and requiring constant and skillful medical care and attention; that he was suffering from fever resulting from typhoid, said to have been contracted by said Cook in the United States infantry service, and had a temperature ranging from 100° to 102°; that thereafter, on or about October 7, 1898, upon the advice of this affiant, said Cook was taken to Washington and from there to Fort Monroe, Va., for care and treatment.

This affiant further states that on October 28, 1898, in the city of Cincinnati, he again treated said Cook, who was still suffering from the effects of said typhoid and in a greatly debilitated condition, mentally and physically, requiring constant medical attention and the attendance of nurses.

That thereafter, during the months of March and April, 1899, affiant saw and treated said Cook, who was suffering from nervous prostration and acute melancholia, as this affiant believes, the result of said typhoid, and affiant says that he advised that said Cook be placed in a sanitarium and rest cure for medical treatment, and that he was thereupon sent to Alma, Mich., Sanitarium, where, this affiant is informed, he remained a period of about ten months under the constant care and attention of physicians and nurses.

Affiant says it is his professional opinion and belief that the condition of said Cook heretofore stated as found by him is wholly the result of typhoid contracted as aforesaid.

Dr. Whittaker's death prevented his being cross-examined by a special examiner as to his foregoing allegations.

Drs. John Wesley Leonard, of St. Joseph, Mo.; Joseph Rauschoff, a fellow of the Royal College of Surgeons, England, and professor of anatomy and clinical surgery, Ohio Medical College, Cincinnati, Ohio; Brooks F. Beebe, Frank H. Rowe, Walter R. Griess, Philip Zenner, and Julius H. Eichberg, all of Cincinnati, Ohio, testified in *ex parte* affidavits to the effect that they had at different times subsequent to the muster out of the soldier examined or treated him; that he was found to be suffering from great nervous and physical prostration and at times from melancholia; that he was, both physically and mentally, wholly disqualified for the performance of any kind of work whatever, either mental or manual, and that, in their opinions, such conditions were the sequelæ of an attack of typhoid fever that the history of the case showed had been contracted in the service.

Several of these affiants were subsequently cross-examined by a special examiner, but none of them failed to substantiate their previous statements as above outlined.

Dr. Elmore S. Pettyjohn testified, in an *ex parte* affidavit filed May 14, 1900, as follows:

That he is a graduate of Rush Medical College, Chicago, Ill., has been attending physician at the Kankakee Insane Asylum, Illinois, from July, 1882, to July, 1885.

That he has been medical superintendent of Alma, Mich., Sanitarium from May 1, 1893, to May 1, 1900, and has been in the general active practice of medicine for the period of eighteen years. That he now relinquishes his management as said superintendent of said medical sanitarium to go abroad as commissioner to visit the hospitals of the insane in Germany, Austria, and France, appointed by the governor

of the State of Michigan, and to attend the International Medical Congress in Paris, affiant being a member of this organization. Said affiant has published throughout the medical journals of the United States treatises upon "Rheumatism, its pathology and modern treatment;" "Erb's primary muscular atrophy" (illustrated); "Chronic internal cerebral meningitis;" "Functional gastric diseases and their treatment;" "The differential diagnosis of neurasthenia and its treatment;" "Constipation, some of its effects and its non-medicinal treatment;" "Sleeplessness, its cause and treatment;" "Diabetes and its constitutional treatment;" "The profession of nursing," etc.

That about April 27, 1899, Charles C. Cook, late captain Company M, First Ohio Volunteer Infantry, was brought by Theodore Cook, jr., to said sanitarium and remained there until July 1, 1899, under the constant daily and nightly care and attention of this affiant and his assistants and nurses and attendants, being treated for nervous prostration and acute melancholia. That when said Cook arrived at said institution he was wholly unable, by reason of long illness and mental and physical suffering, to care for himself, to perform any manual or professional labor, was unable to sleep, required the constant use and application of drugs, opiates, and narcotics by the physicians in the endeavor to produce sleep, was given daily and continuously hydrotherapeutical treatment for neurasthenia and general nervous debility. That on said July 1 said Cook, without the consent or approval of this affiant, the assistant physicians of said institution, or his nurses and attendants, willfully left said institution for Cincinnati, Ohio. Affiant says he was informed that during said Cook's stay in Cincinnati until his return here he was continually sick and under the care of physicians and nurses. That on October 9, 1899, he was brought back to this sanitarium by Clifford S. Cook, his brother, and remained continuously under the medical care and attention of this affiant, his assistant physicians, nurses, and attendants, until March 25, 1900. That when said Cook returned, on October 9, 1899, he was completely exhausted mentally and physically, was totally disqualified for the performance of manual or professional labor, was suffering from acute nervous exhaustion and melancholia, and required daily and nightly presence, care, and attention of physicians and nurses. That he suffered greatly and continuously from chronic insomnia and was wholly unable to obtain rest and sleep without the use of drugs given for that purpose by this affiant, his assistant physicians, nurses, and attendants. Affiant says that during all of said periods, while said Cook was in this institution, he was necessarily there by reason of said illness. That he was wholly disqualified by reason thereof to resume manual or professional labor. That his shattered nervous system and general debility were, in the opinion of this affiant, due to the results of typhoid contracted by said Cook in the United States volunteer service.

This affiant having been absent in Europe at the time the special examination was held in the case, he could not, of course, be cross-examined as to the allegations set out in his foregoing affidavit. It seems hardly probable, however, that a man of high professional and social standing would sign or execute a statement that was not correct in all its essential features, though he might ignore certain details in the statement that were inaccurate, yet thought to be immaterial to the question at issue in the case in point. These remarks are referable to the fact that Dr. H. J. Thompson, who was assistant medical superintendent of the Alma Sanitarium, Alma, Mich., testified in an ex parte affidavit substantially to the same effect as Dr. Pettyjohn did in his, but who, when cross-examined by a special examiner, said that the patient (the appellant) was not, as a rule, confined to his bed,

could dress and undress himself, attend to calls of nature, had no regular nurse, and usually went about alone. Yet this same affiant also said to the special examiner that the said patient was in the sanitarium for treatment on account of insomnia, nervousness, melancholia, and the usual train of symptoms incident to such conditions. He said that these conditions followed an attack of typhoid fever, but that he could not say that they were due to the disease in question. He also said:

Cook was not in fit condition for transacting any business while he was a patient in this place. He was not fit to go out and perform manual labor. He was better when he left here the last time. I did not consider that he was entirely recovered.

Dr. Thompson also testified in his aforesaid ex parte affidavit as follows:

Affiant says that said Cook left because compelled, as he stated, to renew again his profession of law, if possible, or find some other means of livelihood. That said Cook was discharged from said sanitarium as cured, but in the opinion of this affiant and said Dr. Elmore S. Pettyjohn, medical superintendent, it would have been better for said Cook to have remained under treatment for a period of one or two months longer.

Dr. Brooks F. Beebe, of Cincinnati, Ohio, testified, in addition to many other points in the case, that he saw and examined the appellant subsequent to March 25, 1900, the date of his discharge from the Alma Sanitarium, and knew of his condition up to April 15, 1900; that said appellant was much improved, but was still suffering from nervous exhaustion resulting from typhoid fever.

From the amount and character of the evidence furnished in this case, as above set forth, it seems to be established beyond any reasonable doubt that for a period of over one and a half years Captain Cook, the appellant in the premises, was mentally and physically unfitted for the practice of his profession as a lawyer or for the performance of any manual labor. His condition during such period of time has been diagnosed by most of the physicians by whom he was treated or examined from time to time as neurasthenia, with occasional manifestations of acute melancholia. The principal question at issue, then, is, Do the facts presented in the case warrant the conclusion that such condition was due to an attack of typhoid fever from which it is admitted he suffered while in the service? And the question of next importance to be determined is, Accepting such condition as having been caused by the said attack of enteric fever, would it be contrary to law or the rules of practice governing the adjudication of claims for pension to reate this claim during the period referred to in accordance with the degree of disability shown to exist as a result of said condition during said time?

Relative to this last phase of the question, however, the Department has already passed judgment. In a departmental communication dated

September 14, 1901, remanding the papers in the case for further action, it was stated:

Although the act of March 3, 1883, does not state in terms that the degree of disability warranting the allowance of the second grade rate must be permanent in such degree, it has, however, long been held that it was not the intent of the said act to provide the rate in question for a condition of varying intensity and of indefinite existence. And while it has not been the practice to make an approval for a certain sequence of an established cause for a more or less indefinite period, increase the rate during such period, and then eliminate said sequence from the approved pensioned cause or causes and reduce the rate accordingly, it is, nevertheless, believed that it would not be contrary to, or inconsistent with, either the law or practice to vary such practice in cases where the alleged relation of cause and effect between certain disabilities can be clearly traced and the time involved in the case under consideration is sufficiently long to justify a temporary change in rate, and its duration can be satisfactorily determined from the facts presented.

It only remains, then, to settle the pathological phase of the question at issue, and to determine the exact time involved in such question.

In an advisory opinion of the medical referee, dated January 23, 1901, it is stated:

* * * There seems to be a possibility that the temporary affection of the nervous system had some relation to the attack of typhoid fever. If this were established an additional rating for a short period would be warranted. But, as already shown, there are grave doubts and marked discrepancies in the way. It is, therefore, recommended that the papers in the case be referred for a thorough special examination to determine the actual facts and merits of the contention.

As hereinbefore stated, the Department acquiesced in the request for a special examination in the premises.

In an advisory opinion submitted subsequent to the completion of the said special examination, the medical referee stated that the reports of such examination were sufficient upon which to form a basis for action upon the contention of the appellant to the effect that he was entitled to a rerating from the date of filing his claim, November 2, 1898, to the date on which he left the Alma sanitarium, March 25, 1900. But also stated:

In the first place it will be noted that there is no established authority for a rerating over such a period as is claimed in this case. Under the regular practice any rating allowed from the date of filing, or from the date of discharge, must continue at least to the date of the first medical examination. According to the claimant's statements that he is satisfied with his present rating from March 25, 1900, it is evident that a rerating can not be allowed for the period from the date of filing to May 1, 1900, the date of the medical examination. Should it be determined, however, as contended, that a higher rating is warranted for the shorter period to March 25, 1900, a rating in excess of the officer's total should not be allowed, for it has been held by the Department that "disabilities must be permanent in order to receive a grade rating."

The question raised by the medical referee as to the propriety of rerating a claim during such a period of time as that involved in the case at bar, and of allowing a grade rate for a degree of disability that

was not shown to be permanent in such degree, was, as above stated, subsequently determined by the Department in its aforesaid communication of September 14, 1901. The Department also held in such communication that the appellant's satisfaction with his present rate from March 25, 1900, which the medical referee appears to think acts as a bar to his claim being rerated beyond that date, has nothing to do with the case, as such questions must be determined in accordance with the facts presented for consideration in any given case. However, this appellant now contends that he should be rerated up to May 1, 1900, the date of his first medical examination by a board of examining surgeons. It is shown by the evidence of Dr. Thompson that both he and Dr. Pettyjohn were of the opinion that Captain Cook should have remained at least a month or two longer, as they did not consider that he was sufficiently recovered to resume the practice of his profession or to engage in business of any kind. And it is shown by the testimony of Dr. Beebe that as late as April 15, 1900, only two weeks before the pensioner was examined by a board of surgeons in this city, that he was still suffering somewhat from neurasthenia—or, at any rate, from nervousness. These minor points being disposed of it only remains to determine the etiology of the affection of the appellant's nervous system—which, probably, may as well be designated as neurasthenia—that is shown by the evidence herein quoted or referred to as having existed, practically, from the date of filing his original application for pension to the date on which he was first examined thereunder by a board of United States examining surgeons.

In a special chapter on the "Mental disturbances following typhoid fever"—by F. X. Dercum, M. D., clinical professor of diseases of the nervous system in the Jefferson Medical College, Philadelphia, Pa.—in a monograph on "The medical complications, accidents, and sequelæ of typhoid or enteric fever," by Hobart Emory Hare, M. D., B. Sc., professor of therapeutics in the Jefferson Medical College of Philadelphia; physician to the Jefferson Medical College Hospital; laureate of the Medical Society of London, of the Académie Royale de Médecine de Belgique, etc.; it is stated in part that—

The mental complications of typhoid fever resemble in a general way the mental disorders resulting from other infectious diseases. They occur by preference in patients in whom there is present a neurotic heredity or who have been subjected, previous to infection, to overwork, loss of sleep, anxiety, or other exhaustive nervous strains. Hereditary factors—functional neuroses and insanities—appear to be present in about half the cases. It can not be claimed, however, that the other predisposing causes possess much etiological value, as mental complications frequently occur in individuals in which these factors have been absent. Sex appears not to exercise any predisposing influence, males and females being affected in about equal number. Age, also, is not a determining factor. It is, however, somewhat significant that typhoid fever attacks by preference individuals of an age at which mental disorders are very prone to occur, namely, youth and early adult life. Notwithstanding, mental diseases of typhoid origin of sufficient severity to demand asylum treatment

do not appear to be as frequent as this coincidence would suggest. Thus Nasse reported 43 cases among 2,000 hospital admissions; Schlager, 22 cases in 500; Christian, 11 in 2,000; while Pilgrim found only 13 cases in over 6,000 admissions. We should remember, however, that hospital statistics can not be regarded as in any sense representing the real frequency of these disorders. First, a large number of cases do not necessitate commitment; and, secondly, in hospital admissions the etiological relation with typhoid fever is not always brought to the attention of the asylum physicians.

The occurrence of typhoid insanities appear to depend, among other things, on the character of the individual epidemic; they occur more frequently in some epidemics than in others. Among special factors it is not improbable that constipation may be a predisposing cause by favoring the retention and absorption of poisons.

The mental disturbances of typhoid fever are separable into three groups: First, those which develop during the prodromal or initial period; secondly, those which arise during the continuance of the fever; and, thirdly, those which occur during or subsequent to convalescence.

As remarked in the said chapter—

The insanities which arise during or subsequent to convalescence are those which principally concern us here. They may arise during the subsidence of the fever, and may be merely a continuation of the confusion and delirium of the febrile stage; much more frequently they make their appearance after the fever has entirely disappeared.

Post-typhoid insanities may make their appearance in one or the other of the following forms:

1. Acute delirium.
2. Confusional insanity, stuporous insanity.
3. Cerebral asthenia, pseudo-dementia, pseudo-paresis.
4. Insanity with systematized delusions resembling paranoia.
5. True melancholia or true mania.

And as the form therein referred to as "Cerebral asthenia, pseudo-dementia, pseudo-paresis" appears to more nearly approach the conditions manifested in the case under consideration than do any of the other forms mentioned, the observations of the writer in regard thereto, which seem to be peculiarly applicable in this case, follow in full:

Cerebral asthenia, pseudo-dementia, pseudo-paresis: More frequently, perhaps, than any other complication we have following typhoid fever a condition of general mental enfeeblement. This is generally of short duration, but is sometimes excessively prolonged. There is present in such cases a slight, though unmistakable, weakness of the intelligence, together with abnormal excitability and loss or impairment of emotional control. The patient does not comprehend as readily as normally, is incapable of sustained effort, lacks spontaneity of thought, and laughs or cries on relatively slight provocation. He is also very readily fatigued. At times there is in addition a diminution in the facility and readiness of speech. Physical symptoms indicative of weakness are also present—e. g., coldness of the extremities, cardiac palpitation, atonic indigestion, and persistent sleep disturbances. This cerebral asthenia, for some unexplained reason, occasionally follows comparatively mild attacks of the fever, and may be very marked. In other cases, again, in which the attack has apparently been of great severity, these symptoms may be entirely absent.

Instead of a mere mental weakness and anergia, actual mental obtusion may be present, and this mental obtusion may become so pronounced as to lead to great impairment of all the mental faculties—a form of dementia. This is not, however, a true dementia, but one in which the mental faculties are merely suspended, not

obliterated. It is properly termed a pseudo-dementia. This pseudo-dementia lasts many months and at times even one or two years. Recovery follows in the majority of cases, but is very gradual. Sometimes it is incomplete, permanent mental impairment resulting. Every now and then there are added to this background of dementia symptoms which closely resemble those of paresis. Thus there may be present great muscular weakness, ataxia of movement, tremor of the lips, face, or extremities, and to the condition of obtusion, hebetude, and mental weakness already present, there may be added absurd and ambitious delusions. This feeble, expansive state makes the resemblance to paresis appear very striking and often misleading. The pseudo-paresis of typhoid fever may occasion difficulty in diagnosis if the physician be in ignorance of the etiology. However, the detailed history of the case, the presence or absence of the Argyll-Robertson pupil, the condition of the optic nerve as revealed by the ophthalmoscope, are among the factors which should be considered. Pseudo-paresis following typhoid fever almost always terminates in recovery; besides the course of the disease is different from that of paresis. The mental loss, too, is not as profound or as real.

James Tyson, M. D., professor of medicine in the University of Pennsylvania and physician to the Hospital of the University, etc., says, among other things in regard to the complications of typhoid fever, in the second and revised edition (1900) of his *Practice of Medicine*, that—

Cardiac complications, including pericarditis, endocarditis, and myocarditis, are sometimes present. The latter may be a cause of sudden death. * * *

Two sequelae of typhoid fever, neither of frequent occurrence, are conspicuous by their symptoms. They are insanity and tubercular phthisis. The former is often typical acute mania, requiring the utmost vigilance to prevent the patient from injuring himself and others or from escaping from the house or jumping from a window. Although this form of insanity is often prolonged for many weeks, the prognosis is singularly favorable, and recovery sooner or later takes place. * * *

In the light of the record of treatment for typhoid fever while in the service, of the history of the case subsequent to the soldier's muster out—as furnished by himself from time to time, and shown by the evidence supplied by him and adduced upon special examination—of the amount and character of the medical evidence furnished as to the actual condition of the soldier during a period of many months after his discharge, and the opinions expressed by several physicians of conceded high standing in their profession as to the probable cause of such conditions, which opinions, as will be seen, are fully sustained by the views of the authorities above quoted as to the pathologic relation between typhoid fever and certain mental disturbances, especially those of the eminent neurologist Dercum, the Department feels impelled to hold that no sufficient reason exists for declining to sustain the contentions of the appellant in so far as they relate to his alleged right to the second grade rate from the date of filing his original declaration for pension—November 2, 1898, to May 1, 1900, the date on which he was first examined by a board of examining surgeons in pursuance of such claim, and which board reported that no objective symptoms of neurasthenia or nervousness were manifested.

Sufficient has been said herein, it is thought, to indicate the character of the action that should be taken on the brief face in the claim for ratering, which claim is hereby reopened and which will be readjudicated in accordance with the views herein enunciated.

ACCRUED PENSION—PRESUMPTION OF DEATH, ACT MARCH 13, 1896—
PAYMENT.

GEORGE H. OVEROCKER.

The pending invalid claim filed in 1891 was allowed in 1894, which was subsequent to the soldier's disappearance and supposed death in 1893, and the pension was never paid. In 1900 the widow was allowed pension in her own right, under act of June 27, 1890, upon the presumption of soldier's death, after his continued and unexplained absence from his home and family for a period of seven years from date of his disappearance, during which period no intelligence of his existence had been received.

The widow is also held to be entitled to such part of soldier's pension as accrued while he was known to be alive, or from the date of the commencement thereof, as adjudicated, to the date of his disappearance, although the exact date of his death is not known.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 6, 1902.*

George H. Overocker, late second lieutenant, Company D, Thirtieth New York Volunteer Infantry, filed an application April 17, 1891, for pension under the act of June 27, 1890. Later, on December 12, 1891, he filed an application for pension under the general law, alleging the contraction of liver trouble and rheumatism in the service. These claims were not finally adjudicated until November 5, 1894, when the first mentioned was rejected on the ground that no ratable disability under said act was shown, and the other was admitted on account of rheumatism, at \$3.75 per month, or one-fourth of rank, from date of filing.

In the meantime, or about March 18, 1893, as it afterwards transpired, the soldier had disappeared in a sudden and unaccountable way, and had not been seen or heard of by anyone in the community where he had lived, which was Stillwater, Saratoga County, N. Y., a few miles above Troy, N. Y., and on the opposite side of the Hudson River. Hence, no payment could then be made upon the certificate issued under the general law.

An application for pension under the act of June 27, 1890, was filed June 8, 1896, by Nettie Overocker, as the widow of the soldier. Calls were made for evidence showing the date of his death, but this could not be furnished, and no further action was then taken in said claim. She filed another similar application August 8, 1900, and under it evidence relative to the soldier's disappearance and supposed death was

furnished. Her own statement is that her husband, who kept a little harness repairing shop in Stillwater, N. Y., left there about March 18, 1893, for Troy, N. Y., on business, intending to return home that evening, but had not since been seen or heard of by anyone who knew him; that he had no means; was almost wholly incapacitated for work; was daily expecting a pension, which he did not apply for until compelled to, and which was granted shortly after his disappearance, so that he had nothing to gain and everything to lose by going away. The G. A. R. post of his native town (Cambridge, N. Y.) sent out notices with regard to his disappearance, to be read in all the "posts" of the country, but without avail, and the only solution of the mystery is that he was accidentally drowned at Troy and had nothing on his person to identify him.

This account is corroborated by the testimony of others, who declare further that all the soldier's friends believe him to be dead; that it does not seem possible he could disappear so completely unless he met with some accident and could not be identified; that his family and relations believe that he was drowned while trying to cross the Hudson River, as it was in the spring, about the time of the breaking up of the ice, and that this seems the most plausible, if not the only solution of the mystery, as he has never been seen or heard of since the day he thus disappeared.

Other facts developed in a special examination are that soldier had done business in Cambridge, N. Y., but secured a political position about the capitol in Albany, N. Y., which he held about six years; that during this period he became somewhat addicted to drink, but never was a drunkard; that upon losing this position he started the business in Stillwater, or Mechanicsville, and had worked there a few years; that he announced his intention of going to Troy to buy stock, as he afterwards did, and went a portion of the way on a car belonging to his brother-in-law; that he had some money, was not drinking, and intended to return the same night, but did not. Further, that his relations with his wife and family, who lived at Cambridge, were entirely pleasant, and he had no known troubles that would have caused him to voluntarily absent himself.

The rule of law in regard to the presumption of death, as stated in the case of *Davie v. Briggs* (97 U. S., 628), is that—

The person shown not to have been heard of for seven years by those, if any, who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.

The act of March 13, 1896, of similar import to the above rule, is as follows:

That in considering claims filed under the pension laws, the death of an enlisted man or officer shall be considered as sufficiently proved if satisfactory evidence is

produced establishing the fact of the continued and unexplained absence of such enlisted man or officer from his home and family for a period of seven years, during which period no intelligence of his existence shall have been received.

Under this law and upon the evidence before referred to, the death of the soldier was presumed after seven years from his disappearance in 1893, and the claim of the widow filed in 1900 was allowed at \$8 per month from date of filing. The former claim was held not admissible because the period of seven years had not elapsed at the date of filing, June 8, 1896, since soldier disappeared, and the presumption of his death could not then obtain.

The widow further applied for the payment to her of such accrued pension as was due the soldier, but this was denied July 9, 1901, upon the ground that "there is no satisfactory evidence of the date of soldier's death by which to fix termination; and this case is not within the help of the act of March 13, 1896, which relates to a continuing pension."

From this action appeal was taken September 5, 1901, upon the contention that the evidence tends to show that soldier lost his life by drowning and that the date of his death has been fixed by allowing the widow a pension from August 6, 1900.

It may be stated that if this appeal were to be disposed of upon the merits of these contentions only it could be readily overruled or dismissed, for the reason that, first, there is no definite proof that the soldier lost his life at the time and in the manner stated. The testimony on this subject is based on mere theory or conjecture, and may or may not be true. For all that is actually known by claimant or any of her witnesses he might have died in some other way, or he may not be dead at all. The only thing that is definitely proved is the fact of his continued and unexplained absence from his home and family for a period of seven years and more, during which period no intelligence of his existence has been received. This fact is good basis for the presumption of his death at some time within that period, but nothing more.

In the next place, the commencement of the widow's pension from August 6, 1900, the date of filing her application, after seven years from soldier's disappearance had elapsed, can not be taken as at all fixing the date of his death. Commencement of the pension was simply a compliance with the provision of the act of June 27, 1890, which requires all pensions granted thereunder to commence from the date of filing the application therefor, and the legal presumption of death after the seven years' absence only goes to the fact and not to the date of death.

But there is a question growing out of the rejection, as stated, which may be properly passed upon in the consideration of this appeal. That question relates to the title of the widow to that portion of the

accrued pension of the soldier which can be definitely fixed upon, or calculated to have been due him while alive. In other words, the amount which he might have been paid between the date of commencement of his pension and the date when he was last known to be alive—December 12, 1891, to March 18, 1893. He has been adjudged entitled to pension and he was unquestionably alive during that period. This may not be all he was entitled to at the time of his death, and there can be no termination of his pension at the date of death, because said date is not known. But the fact of his death has been established by legal presumption, as already indicated, and it is not apparent why his widow should not receive the amount found to have been due him during the period when he was known to be living.

Certainly there is nothing in the law, either in expression or by implication, that would prevent such payment to the widow. Section 4718, Revised Statutes, as amended by the act of March 2, 1893, provides that—

If any pensioner has died or shall hereafter die, or if any person entitled to a pension, having an application therefor pending, has died or shall hereafter die, his widow, or, if there is no widow, the child or children of such person under the age of sixteen years, shall be entitled to receive the accrued pension to the date of the death of such person.

It could hardly be contended, with any show of reason, that, because the exact date of death is not known and the full amount of the accrued pension to such date can not be determined, this law would permit no part of such pension, or such amount as is known to be due, to be paid to the widow, the fact of the pensioner's death being admitted. On the contrary, it would seem that proper compliance with said law, as well as every consideration of equity, would require the allowance of the pension that had accrued at the date of soldier's disappearance.

Just what idea is intended to be conveyed by the statement in the rejection that "this case is not within the help of the act of March 13, 1896, which relates to a continuing pension," is not clear. If by "continuing pension" is meant one which has not been or may not be terminated, the expression is beside the mark. It is true the act mentioned has relation to the pensions allowable to widow's children or dependent relatives of a soldier whose death is established upon presumption only, and if it should be proved that the soldier is alive the pension would cease, and proper recognition of this law was made in the allowance of this widow's claim; but it is not understood how her title to the accrued pension of the soldier, or any part thereof, is affected by the fact that some termination of such accrued pension must be fixed.

This title to accrued pension, as heretofore shown, is given by section 4718, Revised Statutes, and that section provides that she shall receive it "to the date of the death" of the soldier. But it would be

an anomaly to hold that because the date of the death can not be ascertained, and she may not receive all, therefore she can have no part of such accrued pension, even the amount conceded to have been due the soldier in his lifetime. Considering this matter in all its bearings, the conclusion seems inevitable that this widow is entitled to the pension which has been adjudged the soldier was entitled to from the date of commencement to the date when he was last known to be alive. In this connection it may be remarked that if the widow should ever be able to establish the exact date of soldier's death she would be entitled to such balance as might be due at that date.

The action rejecting the claim is reversed, and the papers are herewith returned for readjudication in accordance with the views herein expressed.

REATERING—WIDOW COMPLETING—INCREASE.

LEANDER J. MOODY (DECEASED).

A claim for reatering not having been on file with the papers in her deceased husband's invalid claim at the time of his death, the claim of the appellant, the widow of the decedent, that she is entitled to have the original allowance of his pension reatered from the date of his discharge to the date on which a substantial increase in rate was allowed in such claim, and to be paid the amount of the pension which might accrue under such a reatering, is held to be untenable, as under the rule laid down in the case of Rowland A. Colby (7 P. D., 24) "the widow of a deceased soldier has no right, under the law, to make and prosecute an original claim for a reatering of her husband's invalid claim."

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 11, 1902.*

Leander J. Moody, deceased, formerly a private in Company F, Thirtieth Wisconsin Infantry, was granted a pension July 16, 1877, at the rate of \$4 per month from February 10, 1877, the date of filing the last material evidence in the claim, for "diabetes." His original declaration for pension was filed April 12, 1876. Under the provisions of the act of January 25, 1879, as amended by the act of March 3, 1879, the soldier was paid arrears of pension—pursuant to an application therefor filed March 20, 1879—from April 28, 1865, to February 9, 1877, the time intervening between the date of his discharge from the service and the date on which his first allowance of pension commenced, at the same rate of such original allowance. A claim for increase filed March 13, 1886, was rejected May 1, 1886, and a similar claim, filed September 21, 1889, was rejected February 7, 1891.

In pursuance of a subsequent claim for increase, filed September 16, 1895, the pensioner was examined by a single surgeon, February 22, 1896; but for some inexplicable reason, which is not made clear by his

deposition before a special examiner of the Bureau, who was directed to procure from the said surgeon the certificate of such examination, the report thereof was not received at the Bureau until April 3, 1899, more than three years subsequent to the date of the said examination.

The said claim for increase was rejected October 23, 1897, on the ground that no medical examination had been made of the soldier thereunder. Upon the receipt of the certificate of the said examination, however, the said action was vacated, the said claim for increase was readjudicated, the rate in the case was increased to \$30 per month (second grade) from the date of such certificate, the benefit of the provisions of the act of March 2, 1895, was accorded in the claim, and the amount of the accrued pension, including the said increase in rate, was paid to the widow of the pensioner, as he had died during the interim between the date on which he was examined by the aforesaid surgeon and the date on which his said claim for increase was adjudicated.

On December 19, 1900, the said widow of the pensioner filed a claim for "arrears of increase of pension," wherein the following allegation was made:

That she claims the said arrears of the invalid increase of pension for twenty-four dollars (\$24) per month from the time of the said soldier's discharge from the Army to the time of the medical examination on February 22, 1896.

This claim was rejected June 3, 1901, on the ground that, from a medical standpoint, the allegation therein set up was unwarranted. There were, however, other and more potent reasons for the rejection of such claim. In the first place, the soldier himself failed to comply with the rules of the Bureau, as approved by the Department, in regard to claims for rerating, as the only claim for rerating he ever filed was incorporated in a claim for straight increase, and it could not, therefore, under the said rules, be considered as a formal application for rerating. His widow, therefore, was not endeavoring to complete a formal claim made and accepted during his lifetime, but filed and prosecuted, though to an unsuccessful issue, an original claim for the rerating at a specified amount of her late husband's original invalid pension, a claim that, under the rule laid down in the case of the widow of Rowland A. Colby (7 P. D., 24) that "the widow of a deceased soldier has no right under the law to make and prosecute an original claim for a rerating of her husband's invalid claim," must be held to be invalid. Secondly, there was no such rate as \$24 per month, the amount per month claimed by the widow, prior to the passage of an act of Congress approved June 4, 1872, which provided such rate for "incapacity to perform manual labor," and also for certain specific causes of disability named in the said act. The said rate is now the third-grade rate, as provided by the act of March 3, 1883; the rate allowed for "disability equivalent to the loss of a hand or foot" for purposes of manual labor. Thirdly, the widow's said claim was for

"arrears of the invalid increase of pension;" and inasmuch as the only increase ever allowed in the invalid claim, except the statutory increase provided for by the act of March 2, 1895, was the increase to second grade from February 22, 1896, the date of the medical examination made of the soldier under his claim for increase filed September 16, 1895, it is not quite clear upon what grounds she could properly base a claim that the said increase in rate should have commenced from the date of his discharge, as, under the law, an increase in rate can only commence from the date of a medical examination held pursuant to a formal application for increase, or from the date of an act of Congress specially providing for such increase. She made no claim as to any supposed insufficiency in the rate allowed under the soldier's last claim for increase.

In an appeal from the rejection of the widow's said claim for a rerating of her late husband's pension she contends that the soldier was entitled to a higher rate of pension than he received from the date of his discharge, April 27, 1865, to the date on which he was allowed the second-grade rate, February 22, 1896, and that she, "as his widow, is now entitled to the same."

She also advances the argument that her deceased husband "ought to have as large a pension as others now living and enjoying better health are drawing." That "others now living" are "enjoying better health" than the decedent goes without saying, but inasmuch as her said husband during his lifetime failed to make proper effort to secure a rerating of his pension from the date of his discharge it must be held that the widow has no more right to file and prosecute an original claim of her own for a rerating of the soldier's invalid pension after his death than she would have had to set up such a claim during his lifetime, or to have filed and prosecuted a claim for original invalid pension or increase of same in his name, unless he was mentally incompetent to prosecute such claim himself and she was his duly appointed guardian. To permit of such a practice would be, in effect, to hold that no action in any case was *res judicata*; and would only serve to involve the Bureau or the Department, or both, in endless and useless controversy over questions long since determined by proper authority, and, tacitly, at least, assented to by the parties most interested—the soldiers themselves.

A widow of a soldier may complete a formal and duly accepted claim filed by him during his lifetime, or she can appeal to the Department from the final action of the Bureau in a claim filed by him, but she can not be allowed the privilege of prosecuting an original claim of her own in his case upon a question which he failed to formally raise himself when he was alive and had the right to do so if he chose.

Although, perhaps, there may have been no reason from a medical standpoint for rerating the original allowance of the soldier's pension,

it is, nevertheless, the judgment of the Department that the claim herein considered should have been rejected on the ground that there was no authority of law for entertaining claims of such a character. Inasmuch, however, as no good purpose would be subserved by rejudicating the said claim in accordance with the views herein set forth the action appealed from is hereby affirmed, and the papers in the case are remanded herewith.

AID AND ATTENDANCE—RATE—ACT JULY 14, 1892.

WILLIAM H. JONES.

By reason of gunshot wound of left arm and injury to right groin, received in the service and line of duty, resulting in a tumor weighing 40 pounds, claimant is totally incapacitated for the performance of any manual labor, and requires the aid and attendance of another person to dress and undress a portion of his body, in taking a bath, and, at times, to attend the calls of nature. *Held:*

1. That he is disabled in such a degree as to require the frequent and periodical, though not regular and constant, personal aid and attendance of another person contemplated in the act of July 14, 1892, and is entitled to \$50 per month.
2. The word "require," mentioned in the act of July 14, 1892, should be given its ordinary meaning, which is, "to make necessary" or "to need."

Cases cited: Ira W. Hayford, 9 P. D., 307; Harrison B. George, 263 L. B., 416; John J. Hill, 7 P. D., 142; Edmond O. Beers, 7 P. D., 113, and Peter N. F. von Otten-dorfer, 3 P. D., 341.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 11, 1902.*

William H. Jones, formerly first sergeant Company E, Third West Virginia Volunteer Cavalry, who is now drawing \$30 per month under the general law for disability due to gunshot wound of left arm and injury to right groin and resulting tumor, filed a claim for increase January 6, 1898, alleging that he requires frequent and periodical attendance of another person. May 28, 1898, this claim was rejected on the ground of no increase shown. From this action appeal was taken to the Department, and on September 19, 1900, the Department returned the papers to the Bureau with instructions to conduct a special examination with a view to ascertaining the fact whether claimant required the personal aid and attendance of another person from the pensioned causes as laid down by the statute. The special examination was held as directed, and thereafter, on December 3, 1900, the claim was again rejected for the same reason as before. October 30, 1901, appeal from this last action was taken to the Department, alleging as grounds therefor that the Bureau was in error in its consideration of the evidence in the case. December 16, 1901, the Department again returned the papers to the Bureau for a further special examination. Such examination was had, and the papers were transmitted to the Department

February 24, 1902, and the claim is to be decided on the merits of the issue raised by the appeal.

That issue is, does this claimant "require frequent and periodical, though not regular and constant, aid and attendance of another person," because of his pensioned disabilities?

The act of July 14, 1892, which provides for the \$50 rating, which this claimant seeks to establish he is entitled to, is as follows:

That soldiers and sailors who are shown to be totally incapacitated for performing manual labor by reason of injuries received or disease contracted in the service of the United States and in line of duty, and who are thereby disabled to such a degree as to require frequent and periodical, though not regular and constant, personal aid and attendance of another person, shall be entitled to receive a pension of fifty dollars per month from and after the date of the certificate of the examining surgeon or board of examining surgeons showing such degree of disability, and made subsequent to the passage of this act.

The medical certificate in issue was made April 30, 1898, and is as follows:

Pulse rate, 88, 100, 110; respiration, 20; temperature, normal; height, 5 feet 6 inches; weight, 160 pounds; age, 61 years. Gunshot wound of left arm. Measurement, right wrist, $7\frac{1}{4}$ inches; left, 7 inches; right middle lower third, 8 inches; left, $7\frac{1}{4}$ inches; right arm, middle upper third, $10\frac{1}{2}$ inches; left, 10 inches; hand slightly smaller than right; wound of entrance on anterior and outer part of forearm at junction of lower and middle third; scar contracted and adherent, $\frac{1}{2}$ by $\frac{1}{4}$ inch; scar of exit or where removed by the surgeon's knife directly opposite scar of entrance on posterior and inner part; scar $\frac{1}{2}$ by 1 inch; not adherent; rating, 10/18. Injury of right groin and resulting tumor: No scar or atrophy at seat of injury, but tumor 31 inches in circumference, 12 inches long, attached to region of right pupart ligament and pubic bone below; does not pass into the scrotum, but to side of it; size of pedicle, 18 inches in circumference; hard, but elastic, fluctuating in spots only, and in my opinion fibro cystic in character. Can only partly dress himself without assistance, but can attend the calls of nature and feed himself unassisted, though not able to walk but a few feet at a time, or so, unassisted. Rating, 30/30. This claimant is so disabled from tumor of right groin as to be incapacitated for performing any manual labor and requires the frequent and periodical, though not regular and constant, personal aid and attendance of another person.

In his statement before the special examiner the claimant said:

I can walk around the house from room to room, sometimes I go to the privy; I, half the time, sleep upstairs; I have to walk up 15 steps, the step $7\frac{1}{4}$ inches high; I usually have somebody to assist me; last summer—no, the spring of the year—I had a fall, and since then I have not gone upstairs without somebody being behind or ahead of me. Going down stairs is the worst. I can feed myself; I can wash my face and hands and can comb my hair. I wear shoes in summer time and low-topped boots in the winter time. I can not reach my lower limbs, can not put on my shoes nor lace them, and I can not put on my boots. I did not put on my boots this morning, my wife put the boots on. I can undress myself; I can take off my coat, my vest, and my shirt; I can not take off my trousers, except by letting them drop and stepping out of them; I can not pull off or put on my socks. When I take a bath usually some one has to assist me, as I can not reach with my fingers my anus; I can from behind and if stooping over. I can not wash my feet. My wife keeps a millinery store; she has done so ever since we lived in this city. She leaves about 8

o'clock a. m. in busy seasons; does not come back at noon; she never returns later than 11 o'clock p. m. I have a family of five girls and one boy; the boy is in Arkansas; he is a railroad man; the youngest girl is about 18 years of age. I have not employed any one yet to aid and attend to me; such aid and attendance is given by members of the family. I can not go to attend to the calls of nature when it is bad weather—raining or snowing—or when it is slippery. My privy is about 30 or 40 steps from the house.

The special examiner stated in his report that claimant “waddled like a goose” when he walked. In his report on the second examination the special examiner said:

I think the pensioner has made a fair statement of his condition in the deposition taken November 12 and 20, 1900, and there is no question in my mind that he off and on needs the aid and attendance of another person on account of pensioned causes, but it is impossible to obtain the testimony of disinterested parties to show how often he requires such aid, or what the nature or character of such aid is and has been, as witnesses are not called in when the same is rendered.

Following is a portion of the report of the special examiner on the testimony given before him by claimant's wife:

Q. Did your husband, as a matter of fact, require the aid and attendance of another person during the period from January 6, 1898, to April 30, 1898, and if so, what person did give such aid and attendance during that time?—A. He most undoubtedly did. Myself, my son, and my two oldest daughters gave such aid and attendance.

Q. Was your son, Nathan M. Jones, here in Brookfield during that period?—A. He was most all of that time. He left in May, 1898; he came to Brookfield about Christmas, 1897; he got married in April, 1901; he is now at De Queen, Ark.

Q. What was the nature and character of the aid and attendance you gave your husband during that period from January 6, 1898, to April 30, 1898? State specifically what you did during that period.—A. I would give him or assist him in his bath; I dressed him—helped to dress him—I did the most of it. I would put on his socks, his shoes, and lace his shoes; I helped him to put on his trousers; he could undo his clothing and drop them; he could feed himself when not sick in bed; he could walk around the house, sometimes he could not. I quite often assisted him at calls of nature. * * *

Q. After April 30, 1898, when your husband was not confined to his bed, did you have to give aid and attendance in the same manner, and why?—A. When not confined to his bed, I had to assist him in taking his bath, bathing and drying his feet, putting on his socks and shoes and lacing them, and had to put on his boots; but sometimes when he felt very weak and debilitated I had to dress and undress him, but he usually when not confined to his bed could dress and undress himself, feed himself, attend to calls of nature, and walk around the house and around the yard, but he could not walk a long distance, and could not stand up for a long time; he had to sit down. Sometimes he brought me to the store and back in the buggy.

Mary G. Jones, a daughter of the claimant, testified that from her personal knowledge her father required the assistance of her mother to dress and undress him. She also testified that the aid given by her mother since January, 1898, was to assist in bathing him, to put on his trousers, his socks and shoes, but most of the time she had to render even more assistance than that.

Dr. A. C. Pettijohn testified that he had treated claimant at various

periods since 1893. He examined claimant's tumor in 1897, and advised him not to be operated upon for it. The doctor stated that because of the tumor the claimant required the frequent and periodical aid and attendance of another person. He said:

I know he can not put on his stockings, shoes, trousers, or drawers; he can not wash his feet or cut the nails thereon; he can not safely go up a stairway and he can not walk any distance.

He also expressed the opinion that the condition of claimant's heart and stomach were traceable to, or the disability was aggravated by, the tumor, which produced a nervous condition.

Dr. H. H. Pratt, who examined claimant's tumor in 1897, gave his opinion of claimant's condition, as follows:

I think he needs aid and attendance when he has to do something with his lower extremities—putting on his stockings, drawers, shoes, lacing them; when putting on his trousers, washing his feet, and cutting his nails. I think he can draw up his drawers and trousers when he is inside them and when they are above his knees, and I think he can drop his drawers and his trousers to his knees. His penis and testicles have entirely disappeared on the surface of the tumor, and under certain circumstances when he is compelled to urinate in the house, I judge that when he has to use a vessel he needs some one to assist him in holding the vessel.

Dr. George N. Lanty testified that in December, 1897, and February, 1898, he treated claimant for hemorrhage of the tumor. He also expressed the opinion that the tumor affected claimant's stomach and heart and led to a nervous condition. This witness stated that claimant was frequently confined to his bed because of various complications.

Three witnesses state from what they know of claimant, because of the tumor he requires the aid of another person in putting on and off his shoes and stockings and trousers, and in all necessary attention to his lower extremities.

Dr. J. S. Evans testified that claimant was under his professional care from 1897 to 1898 or 1899. He had examined the tumor and advised against an operation on account of the age of claimant. He stated that he last saw the tumor in 1898, and that it weighed 40 pounds. Because of the tumor alone this witness said the claimant can do no manual labor; he can not walk any distance; that he can not put on or off his socks, shoes, boots, or trousers; he can attend with some difficulty the calls of nature, but if he has to urinate in the house some one must aid him in holding the vessel.

* * * the penis being practically obliterated, or rather embedded to the side of the tumor; he can dress himself above the waist line; he can feed himself and walk about the house by using a cane, but walking is certainly aggravating to his present local condition. The tumor interferes so much with the circulation that each time I have seen him I have ascribed that as the indirect cause of the maladies for which I treated him at those times.

The above is substantially the material evidence in the case, except four photographs showing the tumor, filed as exhibits.

The language of the statute is:

* * * And who are thereby disabled in such a degree as to require frequent and periodical though not regular and constant aid and attendance of another person. * * *

The word "require," mentioned in the law, should be given its ordinary meaning, it having no technical meaning.

It is a familiar rule of construction that the words of a statute are to be read and understood in their primary or ordinary sense, and according to their usual import and common acceptation, unless to so construe them would be clearly repugnant to the legislative intention, or would lead to manifestly incongruous or absurd results. (Sutherland on Statutory and Constitutional Law, pp. 219, 220; Potter's Dwaris, p. 203.)

Require means in its ordinary significance: To make necessary; to need; to demand; to claim as indispensable. (See Webster's Unabridged Dictionary.)

"To need," seems to be the sense in which the word is used ordinarily. Then the simple issue presented by this appeal is, does the evidence show that this claimant needs the frequent and periodical aid and attendance of another person? It is manifest that this claimant, or no claimant, is compelled by the law, at the expense of great pain and inconvenience to himself, to care for himself, where frequent and periodical attendance of another will permit him to secure the ordinary necessities of life, without such pain and inconvenience. The question to be determined is, will he be put in a position, by the frequent and periodical aid and attendance of another person, where he can secure the ordinary necessities of life, by such attendance, of which he would otherwise be deprived.

It must be conceded that the wearing of shoes and boots, of stockings and trousers, and the taking of baths, are among the necessities of life, and that the evidence shows that this claimant if not aided by another would be deprived of them.

However, it is impossible to lay down any general rule which shall apply alike and at once to all cases which may arise under this statute.

In the case of *Ira W. Hayford* (9 P. D., 307), it was said:

As to just what degree of disability, or amount of aid and attendance is required in consequence thereof, so as to bring the case within the purview of the provisions of the act of July 14, 1892, can not be defined in any general rule. It is not my purpose, nor do I deem it necessary, to lay down any special rule for guidance in all cases of this character other than that which is to be found in the language of said statute.

In the case of *Harrison B. George* (decided January 6, 1898, L. B., 263, p. 416) it was stated:

The words "frequent and periodical" are in express terms contradistinguished from the words "regular and constant," and clearly indicate that periods of time

may occur when aid is not required, and yet the soldier be entitled to the rate named. The conditions named in the act must occur at stated intervals. The length of time between the recurrence is largely a question of judgment as to the intent of Congress.

The question in issue is not wholly a medical question, but is one of fact, to be determined from the evidence in each case. (See cases of John J. Hill, 7 P. D., 142; Edmund O. Beers, 7 P. D., 113.)

The evidence of the claimant, his wife, and his daughter is to the effect that he can not put on his shoes, his stockings, drawers, and trousers, without assistance from another; that when he takes his bath he must have his wife present to bathe his feet and legs; that at other times, not defined as to time, the wife must aid him in attending the calls of nature. This testimony is corroborated by the evidence of several physicians who have examined the tumor, and had opportunity to reach a conclusion as to the extent it was necessary for claimant to have aid and attendance of another person. The location of the tumor is such that it is impossible for any but members of claimant's family and physicians to testify from personal knowledge as to the amount of assistance claimant requires because of it.

The surgeon who examined claimant for the Bureau makes the statement that he requires the frequent and periodical aid and attendance of another person, and therefore the medical certificate "shows" the degree of disability demanded by the statute. A number of local physicians and members of claimant's family and himself testify clearly as to the amount of assistance he requires from others. If there remains any doubt that the terms of the statute are satisfied, such doubt may be well resolved in favor of the claimant.

As was said in the case of Peter N. F. Von Ottendorfer (3 P. D., 341):

The Department has long held that the pension laws should be construed in the liberal and generous spirit which prompted their enactment, and where doubts can not be resolved by evidence, presumption should incline toward claimant.

The only point upon which there can be any room for doubt in this case is the amount of aid and attendance the claimant requires. He is totally incapacitated for the performance of any manual labor, and he requires aid and attendance to dress and undress a portion of his body when he takes a bath, and at times when he attends the calls of nature. It is believed that he requires such frequent and periodical aid and attendance as was intended by Congress in the act of July 14, 1892, and he is therefore entitled to \$50 per month from April 30, 1898, the date of the medical certificate showing such degree of disability, made under the pending claim.

The action of the Bureau is reversed and the papers are returned for an adjudication of the claim in conformity with this opinion.

ATTORNEYS—MATERIAL SERVICE—ORDER NO. 60.

JOHN BENSON (CLAIMANT).

MILO B. STEVENS & Co. (ATTORNEYS).

The filing of a declaration in a claim for reissue to correct the date of the commencement of increase under the act of January 5, 1893, at any time prior to November 18, 1901, the date of the approval of Order No. 60, is deemed material service and may entitle an attorney in such claim to a fee.

The filing of a declaration, motion, or evidence by an attorney in behalf of a claimant, to secure reissue to correct the date of commencement of pension under the act of January 5, 1893, at any time prior to the allowance of such reissue by the Bureau on its own motion, is deemed material service and may entitle such attorney to a fee.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 14, 1902.*

Milo B. Stevens & Co., of Washington, D. C., on February 7, 1902, entered an appeal from the action of the Bureau in the matter of fee on the issue of January 6, 1902, in the claim for pension under the act of January 5, 1893, of John Benson, who served in Company F, Fourth United States Artillery, in the war with Mexico.

The soldier was in receipt of pension at the rate of \$8 per month, under the act of January 29, 1887, when certificate issued, January 11, 1894, in his claim for increase under the act of January 5, 1893, to allow him the rate of \$12 per month from January 2, 1894, date of legal approval by the board of review for admission of the claim in accordance with the provisions of Order 231, dated July 6, 1893, of the Commissioner of Pensions. On said issue a fee of \$2 was paid to James Tanner, of Washington, D. C., as attorney for his services in the claim.

In behalf of the soldier on September 7, 1901, the appellants filed a declaration for a reissue under the act of January 5, 1893, to commence pension at an earlier date than the date fixed under said Order 231, and on January 6, 1902, certificate issued to commence pension at \$12 per month from January 5, 1893. The declaration contained a power of attorney in favor of Messrs. Stevens & Co. However, no fee was certified to them for their services in the claim; hence this appeal.

No additional services were required of the appellants by the Bureau, and none were performed by them. The claim was adjudicated upon the evidence filed in the original claim for increase under the act of January 5, 1893. They were denied a fee under Order No. 60 of the Bureau, approved November 19, 1901, which reads as follows:

ORDER NO. 60.]

WASHINGTON, D. C., November 5, 1901.

Chiefs of Division:

In considering claims for increase under the act of January 5, 1893, which were allowed prior to promulgation of Order No. 375, dated July 11, 1901, it is held that

declarations are not required in order to cause readjudication to fix date of commencement in accordance with the provisions of said order. Such claims will be taken up and readjudicated when they are reached, even though no request is made for such action by pensioners. Cases where the pensioner dies before readjudication or before legal payment is made of any amount found due by reason of change in date of commencement will be treated as coming within the meaning of the act of March 2, 1895.

The class of claims under consideration will be readjudicated only upon the evidence which was on file at the time of the original allowance of increase under the provisions of Order No. 375.

No fee will be certified or paid upon any allowance under such readjudication.

H. CLAY EVANS, *Commissioner*.

DEPARTMENT OF INTERIOR,

November 18, 1901.

Approved.

E. A. HITCHCOCK,

Secretary.

The gravamen of the ground upon which the appellants were denied a fee is that the Commissioner of Pensions has directed that a fee shall not be paid to attorneys for their services in claims of this class.

The question whether an attorney is entitled to receive a fee in a pension claim turns primarily upon the fact whether a claimant for pension is permitted under the law to be represented in his claim by an attorney of his choice who has been duly admitted to practice before the Bureau, and this latter question is one that from time to time has received consideration by this Department, and the conclusion reached by it that in the absence of a prohibitory statute claimants have a legal right to prosecute their respective claims for pension through agents and attorneys. The question was fully considered and discussed and all leading authorities in point cited at length in the case of *Davis v. Davis* (10 P. D., 403), with the result that the conclusion as stated was fully sustained. As this case is of such recent date, and bearing as it does directly upon the matter herein presented, it is not thought that a rediscussion at this time of the law involved would serve any purpose. It suffices to say that under the law a claimant's right to appear by duly qualified representatives of his choice is so well established as to be beyond all doubt, and that it follows as a matter of course that if a claimant has a legal right to employ an agent in a pension claim, the agent is entitled to such compensation as the law provides.

These principles in pension practice are so well known and understood that they may be regarded, without being recited therein, as constituting a part of any order of the Bureau relative to or in any way bearing upon the right of a claimant for pension to be represented by an agent, or to the right of such agent to compensation for his services, so that if an order expressly limits or prohibits the right of a claimant or agent in the particulars noted, it will be regarded as having reference only to cases where the respective claimants have not exercised their right to appoint an attorney or where the attorney has

forfeited his title to a fee under other rules of practice. Therefore Order No. 60 is considered as authority for denying the appellants a fee so far as it conforms with those principles of the law as set forth in the case of *Davis v. Davis*, *supra*, and restated herein.

So the only question presented is, whether the appellants are entitled to a fee under the well-known rules of practice. Hence it will be necessary to consider the character of the claim, of the proceedings instituted, and of the services rendered by the appellants to determine their right to a fee in the premises.

Prior to the decision of the Department in the case of Robert Markwood (11 P. D., 380) the practice was, pursuant to Order No. 231, to commence increase of pension provided by the act of January 5, 1893, from the date of the approval of the claim for allowance by the board of review of the Pension Bureau. Under said decision the practice now is to allow increase from the date subsequent to the approval of the act at which it shall have been established that the conditions of disability and destitution existed, entitling pensioners to increase, pursuant to Order No. 375, promulgated July 11, 1901, which reads as follows:

[ORDER NO. 375.]

WASHINGTON, D. C., July 11, 1901.

In fixing date of commencement of increase of pension under the act of January 5, 1893, the following rules, based upon the decision of the Secretary of the Interior in the case of Robert Markwood, dated June 8, 1901, will be observed:

1. When all the conditions required to give title under this act are shown to have existed on and since January 5, 1893, pension at the increased rate shall be made to commence from that date.

2. When the pensioner is shown to have been wholly disabled at the date of passage of the act, but not in such destitute circumstances that \$8 per month was insufficient to provide him with the necessities of life, the increased rate shall commence from the day on which he became destitute, if it be possible to fix the exact date; otherwise from the date of filing of a declaration after he became destitute.

3. When the pensioner, being destitute, became wholly disabled after the passage of the act, the increased rate shall commence from the date on which he became so disabled, provided the exact date can be fixed, as in case of wound or injury or other sudden or permanent disability; but if it be impossible to fix the exact day on which the pensioner became wholly disabled, the increase shall commence from the date of filing of a declaration after he became so disabled, or, if the evidence filed be insufficient to show him wholly disabled, from the date of a medical examination showing such condition.

A pensioner who is 75 years of age shall, in accordance with Orders Nos. 193 and 242, be regarded as wholly disabled.

4. When the pensioner is 75 years of age or more, the increased rate shall commence from the day after the passage of the act on which he became 75 years old, provided that all other conditions required to give title under this act are shown to have existed on that date, provided that there be no earlier date from which the increase can be made to commence.

5. When title is derived from the act of January 5, 1893, through the act of April 23, 1900, the above rules will apply, except that the increase shall in no case commence prior to April 23, 1900.

H. CLAY EVANS, *Commissioner*.

Approved July 12, 1901.

E. A. HITCHCOCK, *Secretary*.

It will be noted that in all claims for increase under the act of January 5, 1893, adjudicated under Order No. 231, and where the pensioners are still living, applications can be made for reissue to correct the date of commencement of pension from the date fixed pursuant to Order No. 231 to one of the four or more dates designated in Order No. 375, *supra*. Such applications have for their object the securing of pension, which is the test in proceedings under pension laws determining whether the proceedings constitute a claim for pension. (See *Davis v. Davis*, 10 P. D., 409, text.) So as the proceedings instituted by the appellants constitute a claim for pension, and they were duly authorized to prosecute the claim under the decisions of the Department, they would be entitled to a fee, provided they performed any material service in securing the pension allowed.

By Order No. 60 it was directed that the class of claims under consideration would be readjudicated only upon the evidence on file at the time of the original allowance of increase; in said order it was stated that the filing of declarations was not necessary for the purpose of securing arrears of increase.

In the case of John Dies, dated December 16, 1901 (457 L. B., 262), it was held that a pensioner would be permitted, in a claim for reissue under the act of January 5, 1893, to submit evidence showing the existence of conditions entitling him to increase, at such dates as increase of rate would be allowed to commence under said act; and, in answer to the Bureau's communication calling attention to the fact that said decision abrogated Order No. 60 in the particular that readjudication would be made only upon the evidence on file at the time of the original allowance of increase under the act of January 5, 1893, the Department in February, 1902, informed the Bureau, in substance, as follows:

That said order was supposed to mean only what it stated plainly on its face; that is to say, that declarations would not be required of pensioners in such cases, but the claims would be taken up by the Bureau, and the commencement of increase under the act of January 5, 1893, readjudicated in accordance with the decision of this Department in the case of Robert Markwood (11 P. D., 380), where the evidence on file afforded sufficient data for readjudication. However, it was understood, as nothing was contained in the order indicating any other intent, that where, as in the present case (*John Dies*), the pensioner had filed an application for reissue to correct the date of commencement of pension and submitted evidence showing that conditions entitling him to increase under the act of January 5, 1893, existed at an earlier date (subsequent to the passage of said act) than is shown by the evidence on which the original issue to allow increase under said act was made, then said order had no application, and the claim for reissue would be readjudicated upon all the evidence filed bearing on the question at issue.

The practice relative to the manner in which proceedings should be instituted looking to the securing of a reissue to allow increase from the proper date under the act of January 5, 1893, whether by filing a declaration, by motion, or other method, is properly a subject for regulation by order of the Bureau, as is also the evidence to be required in such claims, the same as those matters are subjects for regulation in other classes of pension claims. However, under Order No. 60, as construed by this Department in the cited case, it would seem that where a claimant has seen fit to take steps to secure his rights under the act of January 5, 1893, the proceedings instituted by him can not be ignored.

In this particular case it is noted that the declaration was filed September 7, 1901, or over two months prior to the time when Order No. 60 became operative. At the time said declaration was filed the usual method of procedure in claims for pension was by filing a declaration. (See Regulations, Pension Laws Pamphlet, 1899; Treatise on the Practice of the Pension Bureau, p. 6.) Therefore it must be regarded that appellants by filing a declaration for pension in this claim proceeded according to the rules of practice and that the filing thereof was material service. Any subsequent changes in the practice would not operate to render such service immaterial, inasmuch as it was material when performed by the appellants.

It appears that the proceedings instituted by the appellants in behalf of the claimant constitute a claim for pension; that they were duly authorized to prosecute said claim, performed material service in its prosecution, and were in good standing when it was allowed. Under these conditions it was error to deny them a fee, and the action of the Bureau in so doing is accordingly reversed.

PRACTICE—APPEALS—ACT OF MARCH 3, 1899.

ADDIE YATES v. DAVID YATES.

Appeals in cases under the act of March 3, 1899, when perfected in accordance with Rule 14, Rules of Practice, which requires that they should be accompanied by proof of service of the same on the appellee, will be transmitted to the Bureau of Pensions, whereupon the necessary steps for the suspension of payment of half of the pension due or to become due will be taken, and thereafter, not later than thirty days from the date of filing the appeal, such appeal, and the papers in the case, together with the Commissioner's report thereon, will be returned to the Department.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 15, 1902.*

Herewith is inclosed the appeal of David Yates, late private Company K, Third Tennessee Infantry, and a pensioner under certificate

No. 448728, from the Bureau action allowing the claim of Addie Yates for division of pension under act of March 3, 1899, with the docket jacket No. 74748.

You are directed to take the necessary steps for the suspension of payment of one-half the pension due or to become due pensioner, pending the consideration of the appeal which was filed March 13, 1902, and at your earliest convenience and within thirty days from the date on which appeal was filed, forward the papers in the case and the inclosed papers with your report to this Department.

In future, appeals under said act of March 3, 1899, when perfected as required by Rule 14 of Practice, will be transmitted to the Bureau, whereupon you are requested to take similar action as indicated herein.

SERVICE—DESERPTION—ACT OF JUNE 27, 1890.

HENRY DENNY.

The claimant did not serve ninety days during the war of the rebellion.
The Government will not credit time spent in desertion in estimating length of service under the act of June 27, 1890.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 18, 1902.*

Henry Denny enlisted in the Fourteenth Battery, Massachusetts Light Artillery, January 29, 1864, and was discharged July 17, 1865.

February 28, 1891, he filed a claim for pension under the provisions of the act of June 27, 1890, numbered 685130, alleging various disabling causes, and that he had served at least ninety days during said war.

This claim was rejected October 9, 1896, upon the ground that the soldier did not serve ninety days during the war of the rebellion.

From this action he appealed August 31, 1899, contending that the records of the War Department now show that he enlisted January 29, 1864, and was discharged July 17, 1865.

This would give a service of one year five months and eighteen days—a much longer period of service than that required by the statute. But did he actually serve ninety days or more?

The reports of the War Department relative to this issue are dated January 7, 1896, and March 2, 1896, and read, respectively, as follows:

It appears from the records of this office that Henry Denny, private, Fourteenth Independent Battery, Massachusetts Light Artillery, was enrolled January 29, 1864, at Boston, Mass., to serve three years. He was mustered into service as a member of said battery February 27, 1864, and is reported as having deserted therefrom on March 19, 1864, at Readville, Mass. He did not rejoin his command, which remained in service until June 15, 1865, but appears to have surrendered to the

military authorities at Washington, D. C., on or about July 10, 1865, as a member of the Fourteenth New York Heavy Artillery, in which he did not enlist, and claimed the benefit of the President's proclamation of March 11, 1865, to which he was not entitled.

He was forwarded to and confined at the Old Capitol Prison, on July 10, 1865, and was released therefrom on July 14, 1865. The discharge register of the Department of Washington shows that he was discharged July 17, 1865, as of the Fourteenth New York Heavy Artillery, but without pay.

It also appears from a report from the accounting officers of the Treasury Department that this man was not paid on final statements or discharged from the military service of the United States.

Upon investigation it has been determined by this Department that Henry Denny, Fourteenth Battery, Massachusetts Light Artillery Volunteers, reported—date unknown—under the President's proclamation of March 11, 1865, and was discharged from the service July 17, 1865, at Washington, D. C. The charge of desertion of March 19, 1864, therefore, no longer stands against him, but the record of the fact that he was absent in desertion from March 19, 1864, until he reported to the military authorities—date unknown—can not be expunged.

This Department and the Pension Bureau are bound by the records of the War Department (Case of George W. Drake, 9 P. D., 273).

If the claimant's statement on appeal is to govern, he served during the war of the rebellion for a longer period than is actually necessary under the provisions of the act under which he has applied. He deserted March 19, 1864, and had therefore fifty-one days of actual and honorable service up to the day when he deserted.

But to give him him any status under the act in question he must be credited with thirty-nine days more of service. Can this time be properly added from the period during which soldier was absent in desertion?

It appears the claimant took advantage of the President's proclamation and presented himself before the authorities and received his discharge. This discharge was not even from the service into which he had enlisted, but this point is technical and will not be discussed, as the War Department has held that the charge of desertion no longer stands against him, and so far as the requisite of the statute that a discharge of this nature is one of the prerequisites to pensionable status is concerned, no obstacle would be in claimant's way. But from March 19, 1864, until July 10, 1865, a period of one year three months and twenty-two days, this soldier was absent from his command as a deserter. His whereabouts were unknown. He was shirking or avoiding at least, to put it mildly, the duties and obligations of a soldier. He certainly was not rendering any service to his country, for his desertion not only took him absolutely from the path of his duty and service

but was a reproach to his country, to his command, to his comrades, and to his manhood. He was depriving his country of the services which he had voluntarily offered, which had been legally accepted and which were due in its time of need.

It would be anomalous indeed were this Department to hold that time spent in desertion and in the avoidance of duty could be credited as service in the aid of the suppression of the rebellion. The law does not contemplate nor would it stand any such construction.

During the limited period of time required by this statute every soldier who seeks its benefit must have been at least in a position to respond to every proper call for duty.

This claimant was not in such a position. He did not render ninety days' service during the war of the rebellion and he has no status under the law in question.

Your action is sustained.

IDENTITY—WIDOW'S CLAIM ACT JUNE 27, 1890.

MARY E. WASHINGTON (WIDOW).

Appellant filed her claim for pension under the act of June 27, 1890, as the widow of one George Washington, late of Carlisle, Pa., who she alleged served in Company E, Fifth Massachusetts Volunteer Cavalry. On April 3, 1894, one George Washington, residing in Boston, applied for a pension as the person who served in said company and regiment, and his claim was admitted after a special examination, November 9, 1896, appellant's claim having been rejected September 8, 1896, on the ground that the evidence failed to show that her deceased husband was the person who served in said company. Subsequently she filed additional testimony to establish the identity of her late husband, but the former rejection of her claim was adhered to. It appears that appellant was in possession of the discharge certificate of the George Washington who rendered the service in said organization, when she filed her claim for pension, and it appeared that the same was in the possession of her late husband as early as 1874, but it appeared just as clear that it had at one time been in hands of the George Washington of Boston, and the personal description therein was unquestionably that of the latter. In view of the fact that a large number of witnesses of good reputation, including comrades, one of whom was a white lieutenant in said company, testified with the pensioner before them, that he was the identical George Washington who rendered the service in said organization, and the superior standing and character of the witnesses testifying in behalf of the pensioner, as compared with those testifying for appellant, it is held that the evidence does not show that her deceased husband was the soldier who rendered the service as George Washington in Company E, Fifth Massachusetts Cavalry, and her claim for pension was properly rejected.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 18, 1902.*

Mary E. Washington filed in the Bureau on August 9, 1890, an application for pension under the provisions of the third section of the act of June 27, 1890, as widow of George Washington, alleged private in

Company E, Fifth Massachusetts Volunteer Cavalry, alleging therein that her deceased husband had served in said organization for more than ninety days during the war of the rebellion, had been honorably discharged from said service, and had died on April 24, 1885, leaving her as his widow surviving, without other means of support than her daily labor.

Said application for pension was rejected on September 8, 1896, upon the ground that the evidence failed to show that the deceased husband of the claimant was the George Washington who had served as a private in Company E, Fifth Massachusetts Volunteer Cavalry, during the war of the rebellion, or that he was ever a duly enlisted man in the military service of the United States.

Subsequently, during the years 1897, 1899, and 1901, the claimant filed additional testimony for the purpose of establishing the identity of her deceased husband as the George Washington who served as a private in Company E, Fifth Massachusetts Volunteer Cavalry, during the war of the rebellion, and made application for a reopening and reconsideration of her claim in the Pension Bureau. Said additional testimony was duly and carefully considered, and on June 1, 1901, it was held to be insufficient to warrant any change of action, reopening of the claim was denied, and the action of rejection was adhered to upon the same grounds.

From said action of rejection and the refusal to reopen and reconsider the claim upon the additional testimony, as aforesaid, the present appeal was taken on July 25, 1901.

It appears from the papers accompanying this case that on April 3, 1894, one George Washington, residing in Boston, Mass., also filed an application for pension under the second section of the act of June 27, 1890, alleging that he was the soldier who had enlisted and served in Company E, Fifth Massachusetts Volunteer Cavalry, during the war of the rebellion, and had been honorably discharged therefrom. After a very careful and exhaustive investigation of this claim, as well as of the claim for widow's pension of Mary E. Washington, the claim of the Boston George Washington was admitted on November 9, 1896, and on November 13, 1896, a certificate was issued to him under said section at the rate of \$8 per month from the date of filing his application for partial inability to earn a support by manual labor from double inguinal hernia, which pension he is now receiving.

It is earnestly contended by the appellant that her deceased husband was the true and only George Washington who served in said company and regiment during the war of the rebellion, and that the George Washington who is now living and pensioned on account of said service had falsely and fraudulently personated her said husband, and had by misrepresentation and perjury obtained the pension on account of said service to which she was lawfully entitled. It is thus apparent that the only question at issue and to be determined under

this appeal is the identity of the George Washington who served as a private during the war of the rebellion in said company and regiment.

The official military records of the War Department show that but one person by the name of George Washington enlisted and served during the rebellion in Company E, Fifth Massachusetts Volunteer Cavalry. This George Washington enlisted on February 5, 1864, and served continuously until October 31, 1865, upon which date he was mustered out and discharged the service with his company. The evidence in this claim of the widow, and also in that of the George Washington who is now pensioned, conclusively shows that there was but one George Washington in said company. The records of the War Department show that there were several George Washingtons who served in other companies of said regiment, but these persons are all satisfactorily accounted for, either by the record itself, or by the evidence in the cases, and no one of them could by any possibility have been either the deceased husband of this appellant, or the George Washington, of Boston, Mass., who is now living and pensioned. Furthermore, at the time she filed her claim for pension this appellant had in her possession the certificate of discharge of George Washington from Company E, Fifth Massachusetts Volunteer Cavalry, and she stated under oath that she had no knowledge whatever of any military service rendered by her deceased husband other than that mentioned in said discharge certificate, and based her claim for pension solely thereon. The George Washington who is now a pensioner has also declared under oath that he rendered no military service except in Company E, Fifth Massachusetts Volunteer Cavalry, and had never enlisted in, or belonged to, any other military organization in his life, and in this statement he is fully corroborated by the most reliable testimony in the case.

The question in the case is thus narrowed down to the single issue: Was the man who is shown by the record to have served in Company E, Fifth Massachusetts Volunteer Cavalry, the deceased husband of the appellant, or was he the pensioner, George Washington, who is now living in Boston, Mass.?

Owing to the conflicting nature of the evidence and the number of credible witnesses who testify positively on either side this is a most difficult question to satisfactorily determine.

In the claim of the widow for pension, now on appeal, the following facts appear to be clearly established by the evidence: The appellant has resided all her life in Carlisle, Pa. She was first married in that place to one John Cuff, who was a soldier during the war of the rebellion, and who died in the service, and she was pensioned as Cuff's widow under the provisions of section 4702, Revised Statutes, and drew said pension until March 20, 1883, upon which date she is shown by the evidence to have married the deceased George Washington in

Carlisle, Pa., as whose widow she now seeks pension. The evidence shows that her husband, George Washington, first appeared in Carlisle, Pa., some time in 1862, but where he came from and his previous history is not clear, further than it is intimated that he had been a slave and had escaped into the Federal lines from some place either in Virginia or Maryland. At the time this George Washington came to Carlisle, Pa., the appellant was then living in that place with her first husband, Cuff, and this George Washington lived and boarded at her house. After the enlistment and death of Cuff he continued to board with the appellant until some time in 1864, when, it is claimed, he went to Massachusetts, with other colored men from Carlisle, Pa., for the purpose of enlisting in the Fifth Massachusetts Volunteer Cavalry. Upon his return to Carlisle from his alleged military service, in 1865, he again went to live with the appellant, and the evidence shows that from that time up to March 20, 1883, they lived together in the same house as husband and wife, and upon said date they were formally and legally married by a justice of the peace, and thereafter continued to live together as husband and wife to the date of this George Washington's death, which is shown to have occurred on April 24, 1885.

There can be no question, from the evidence, as to the fact that the George Washington with whom this appellant lived, and to whom she was married in Carlisle, Pa., died and was buried in said place on the date above mentioned, and it furthermore appears in evidence that a tombstone was erected over his grave at the expense of the Government of the United States, inscribed with his name and giving his service as a private in Company E, Fifth Massachusetts Volunteer Cavalry.

On special examination Alexander Baker, who served in Company E, Fifth Massachusetts Volunteer Cavalry, Joseph Howard, of Company I, John Davis, of Company C, and James Williams, of Company L, of the same regiment, all of whom are reported to be colored men of good reputation and credible witnesses, and whose military service and presence with said regiment is verified by the records of the Adjutant-General's Office, testified positively, distinctly, and emphatically that they were acquainted with the deceased husband of the appellant in Carlisle, Pa., prior to their enlistment in the Army; that they went in company with the said George Washington from Carlisle to Massachusetts for the purpose of enlisting in the service as recruits for the Fifth Massachusetts Volunteer Cavalry; that the said George Washington did enlist in said regiment at the same time with themselves, at Readville, Mass., and was assigned to Company E, and served therein until the discharge of said company and regiment in October, 1865, to their personal knowledge, and then returned to Carlisle, Pa., where he resided until his death. Baker swears that he

served in the same company with appellant's deceased husband, and the records of the War Department corroborate this statement; that he was one of the buglers of said company, and that he was discharged from the service at the same time with the appellant's husband and returned in company with him to Carlisle, Pa., and that he personally knows that he was the only George Washington who served in said company during the war of the rebellion.

George W. Jackson, who is reported to be of good standing and credibility, testified that he resided in Carlisle, Pa., in 1864, and that he accompanied the appellant's husband, at his solicitation, to Readville, Mass., for the purpose of enlisting in said regiment, but that he was rejected as a recruit on account of his youth. He states, however, that he was employed as a servant by the white commissioned officers of Company E of said regiment, the same company in which it is alleged appellant's husband served, and accompanied said organization in that capacity during all its service from its organization to its disbandment at the close of the war, and that the George Washington of Carlisle, Pa., who afterwards married this appellant, served in said company as an enlisted man during the whole time he was with it; that he knew him intimately, and associated with him continuously during the time of his service in the Army, and that he returned with him from Boston Harbor, the place of disbandment of said regiment, to Carlisle, Pa., and knew him continuously in that place from that time until his death in April, 1885.

Furthermore, the discharge certificate of the George Washington who served in Company E, Fifth Massachusetts Volunteer Cavalry, was in the possession of this appellant, and was given by her in May, 1895, to a special examiner who investigated this case. She gives a perfectly reasonable and apparently truthful account of how this discharge certificate came into her possession. She states that her husband, George Washington, brought it with him when he returned from the Army to her house in 1865; that some years prior to her marriage to him he sent it to Washington City, D. C., for the purpose of being used as evidence in a claim for bounty he was then prosecuting before the Treasury Department; that the discharge certificate remained in Washington for some years, and was then returned to her husband, who placed it in the pocket of his Sunday coat and kept it in his trunk; that when her husband died, and they were about to prepare him for burial, she removed the papers in the pocket of said coat, including this discharge certificate, and that since that time it has been in her possession. This statement of the appellant is fully corroborated by the records in the office of the Auditor of the Treasury for the War Department, which show that on April 10, 1874, George Washington, of Carlisle, Pa., applied for bounty as a private in Company E, Fifth Massachusetts Volunteer Cavalry, and that his certifi-

cate of discharge from said company was sent with and filed as a part of said application. The Auditor of the Treasury furthermore certified that said discharge was on file in his office from April 10, 1874, till February 26, 1878, upon which date it was returned by the Auditor to George Washington at Carlisle, Pa.

The foregoing evidence would appear on its face to be almost conclusive of the fact that the husband of this appellant was the true and only George Washington who served in Company E, Fifth Massachusetts Volunteer Cavalry; but when the evidence on file in the case of the George Washington of Boston, Mass., is examined in connection therewith a most remarkable and unprecedented state of facts is developed.

In the first place all the witnesses, including this appellant herself, who have testified in the widow's claim, describe the George Washington who lived in Carlisle, Pa., as a spare, thin-faced man with a light brown complexion, rather sandy hair, and about 5 feet 8 or 10 inches in height. The personal description given in the certificate of discharge which was in the possession of the appellant wholly fails to correspond with the description given by the witnesses of her deceased husband. The George Washington to whom the certificate was issued is described as a short, stout black man, with black woolly hair, black eyes, and about 5 feet 4 inches in height. This description corresponds exactly with the George Washington of Boston, Mass., who is now pensioned on account of service in said company, and who is shown by the testimony, as well as by a photograph on file with the papers in this case, to be a broad-featured, intensely black man, with all the typical peculiarities of his race.

Although the Boston George Washington is shown by his testimony to be wholly untruthful and absolutely unreliable, so that none of his statements can be accepted unless corroborated by circumstances or by other credible testimony, he makes one statement in regard to this discharge certificate which appears to be corroborated in a very remarkable manner. He is clearly shown to be an intensely ignorant man, utterly unable to read or write, or, in fact, to tell one letter from another, and yet, upon cross-examination by a special examiner, upon being asked if he could tell his discharge certificate if he saw it, and before he had ever seen the discharge certificate referred to in this case, he made the following statement: He said that at some time after his discharge from the service, and while he was employed on a steamboat on the Ohio River, he was on one occasion engaged in doing some painting on said boat, and while thus at work the fact that he had ever been a soldier was questioned by some of his fellow-workmen, and in order to prove that he had been in the service he went to his bag or kit and took out his discharge certificate; that his hands were soiled with paint and that the imprint of his fingers and thumb was thus made

upon the papers, and that if he should see his discharge certificate he could identify it by these marks. Upon the certificate being produced and handed to him by the special examiner, he pointed out the finger marks thereon exactly as he had stated, and showed exactly how the paper had been folded at the time and how the marks had been made thereon.

Notwithstanding the foregoing, which would seem to conclusively identify the discharge certificate as the one issued to the George Washington of Boston, Mass., he was unable to give any truthful or satisfactory account whatever as to how said certificate ever got out of his possession and into the possession of the George Washington of Carlisle, Pa. He told at least three or four absolutely inconsistent and conflicting stories as to how he lost his discharge certificate, every one of which were proved, and admitted by him to be untrue, and he finally confessed that he did not know and could not tell when, how, or where he had lost his discharge certificate, but he consistently stuck to it that the certificate shown him by the special examiner, and which was in possession of this appellant, was the identical certificate that had been issued to him upon his discharge from the service as a private of Company E, Fifth Massachusetts Volunteer Cavalry, and which he had lost. The Boston George Washington was also unable to give any clear or satisfactory account of his history, either prior to his enlistment or subsequent to his discharge from the service. In relation to this he made at least five or six different statements as to where he had been raised, the circumstances under which he was enabled to obtain his freedom from slavery, and the place from which he came to Massachusetts to enlist in the Union Army. He appears to be also equally uncertain as to his movements and places of residence after his discharge from the service up to about 1885, since which year he is shown by the other testimony to have resided in Boston, Mass. In fact there is hardly a statement made by this man relative to himself that he has not either flatly contradicted or with unblushing effrontery subsequently admitted to be an untruth, with the single exception that he enlisted and served in Company E, Fifth Massachusetts Volunteer Cavalry, during the war of the rebellion, from February, 1864, to October, 1865.

Upon special investigation of the case of the George Washington of Boston in connection with the claim of this appellant, Edward J. Bartlett, who is shown by the records of the War Department to have been one of the white commissioned officers, second and first lieutenant, of Company E, Fifth Massachusetts Cavalry, and to have served with said company during the whole time of its existence, testified positively to the identity of the George Washington of Boston as the man who had served under that name in said company, and, furthermore, that no other George Washington had ever belonged to that company, and

no man answering the description of the deceased husband of this appellant, the George Washington of Carlisle, Pa. This witness is reported to be a gentleman of high standing and character and of excellent reputation. Upon being confronted with the George Washington of Boston and asked the question if he recognized him, he stated that he could not do so positively, but that he believed him to be a man by the name of George Washington who had served in his company during the war of the rebellion. He then requested the special examiner to permit him to question the George Washington then present relative to certain matters that had occurred during the service of said company and which could not possibly be within the knowledge of the Boston man unless he were the true George Washington who had served in said company. This he did very carefully and thoroughly and in the presence of the special examiner, who took down the same and made it a part of the deposition of George Washington, and at the end of said examination Lieutenant Bartlett positively and unequivocally identified the George Washington of Boston as the only man by that name who had ever served in said company and regiment.

In addition to this testimony Frank W. Lee, who served as a sergeant in said company and regiment, Lemuel Barnes, who was a private in said company, John L. Swarts, who served in Company F of said regiment, John W. Harvey, who was a member of Company A, and Lewis A. Clark, who was a member of the band of said regiment, all positively and emphatically swear that the George Washington of Boston was the man who enlisted and served in Company E of said regiment, that they knew him well in service, served with him continuously from 1864 to 1865, were discharged the service at the same time, and they positively and personally identify the said George Washington, who was then present, as the identical man with whom they served and of whom they testified, and state that they positively know that he is the soldier in question. These witnesses also swear that no other man by the name of George Washington served in said company; and that no man answering the description of the George Washington of Carlisle, Pa., served in said regiment to their knowledge. The service and presence with said company and regiment of all of these witnesses is also verified by the records of the War Department, and they are reported to be, without exception, persons of more than usual intelligence and credibility for their class and station in life.

A photograph of the George Washington of Boston was obtained during the special examination of this case, and was exhibited to this appellant, and to all the witnesses in her case who had testified as to the identity of her deceased husband, and both she and said witnesses positively and emphatically swore that they knew no such man, had

never seen him in their lives, and did not recognize said photograph as the picture of any person that they had ever known or seen.

With such positive, direct, and unequivocal testimony, given on both sides of this case by witnesses of reported good credibility, as to the identity of these two parties, it is a difficult matter to satisfactorily determine which one of the two George Washingtons was the soldier who served in Company E, Fifth Massachusetts Volunteer Cavalry. Although it may not be possible to settle this question upon the proof on file beyond all doubt or question, yet it must at last be determined upon the preponderance and weight of the testimony adduced, and this is clearly with the George Washington of Boston.

In the first place, the standing and character of the witnesses who testify to the identity of George Washington of Boston as the soldier who served in Company E, Fifth Massachusetts Volunteer Cavalry, are manifestly superior to that of the witnesses who testify as to the identity of the deceased husband of this appellant. Not only does a white commissioned officer of said company identify the Boston man as the soldier, but the colored witnesses are clearly more intelligent and their testimony more direct and positive than that of the Pennsylvania witnesses who testify in behalf of the appellant.

In the second place, the witnesses testifying in behalf of the appellant are swearing as to the identity of a man who had been dead and buried for ten years, whereas the witnesses who testify as to the identity of the Boston George Washington positively and definitely identify him, then present, as the man with whom they served in Company E, Fifth Massachusetts Volunteer Cavalry, and state that they *know* that he is the George Washington who served in said company. This is absolute and positive identification, and can not be gainsaid, and therefore is entitled to the greater weight as evidence.

As to when or how the certificate of discharge of George Washington from Company E, Fifth Massachusetts Volunteer Cavalry, came into the possession of George Washington of Carlisle, Pa., the evidence does not explain, and it apparently must remain an unsolved problem. It was undoubtedly in his possession as early as 1874, for he then filed it in the Treasury Department in connection with his claim for bounty, but it is just as clear that it must have been also in the possession at some time of the George Washington of Boston, and the personal description therein is unquestionably that of the present pensioner, and not that of the man who lived and died in Carlisle, Pa. Whether or not some mistake was made at the time of discharge, and the wrong certificate of discharge was issued to the deceased husband of this appellant, we do not know, but this fact seems to be clearly demonstrated by the weight of the evidence, that the man who served in said company and who is described in said certificate of discharge was the George Washington of Boston, who is at present receiving a pension on account of said service.

Since it is clearly established that but one George Washington served in said company, and that the husband of this appellant was never known by any other name than that of George Washington, and that he served, if he served at all, under that name, he could not have been the man that served in said company and regiment. If he did not serve therein, there is no proof whatever in this case that he ever enlisted or served in the military service of the United States at any time.

The additional testimony filed by this appellant since the rejection of her claim consists solely of a number of affidavits made by persons who had previously testified therein, in which their former testimony was merely repeated, and adds nothing whatever to the case, and furnishes no information on any material point that had not been theretofore fully and fairly considered.

For the foregoing reasons the Department is of the opinion that the evidence in this case fails to establish the fact that the deceased husband of this appellant was the George Washington who served during the war of the rebellion as a private in Company E, Fifth Massachusetts Volunteer Cavalry, or that it has been shown he was ever at any time an enlisted soldier in the military service of the United States.

Therefore, the rejection of this claim for widow's pension upon the ground stated is held to have been without error, and is affirmed accordingly.

DIVISION OF PENSIONS—ACT MARCH 3, 1899.

MARY A. FILONES V. CHRISTOPHER FILONES.

Pensioner was shown to have been an inmate of a State home for soldiers or sailors for over two months after the filing of an application by his wife for division of his pension under the second proviso of the act of March 3, 1899. The rejection of her said claim on the ground that the pensioner was not, at the date of the adjudication, an inmate of a soldiers' home, was, therefore, error.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, March 20, 1902.

Mary A. Filones, wife of Christopher Filones, late of Company H, Eighty-third Indiana Volunteer Infantry, appellant, appealed October 27, 1900, from the Bureau action of September 22, 1900, rejecting her claim for one-half of her husband's pension (Certificate No. 954485), filed September 18, 1899, under the second proviso of the act of March 3, 1899, on the ground that "pensioner was discharged from soldiers' home November 20, 1899."

On April 25, 1901, you reported that the action appealed from had been receded from, and requested that the appeal be dismissed.

Attention was also invited to the fact that no notice or copy of the

appeal had been served on the pensioner, as required by the rule announced in the Ellis case (11 P. D., 288), and the appeal was accordingly dismissed May 21, 1901, for lack of proof of service of a copy of the appeal.

Claimant having furnished proof of service of said appeal upon the pensioner as required, her appeal was reinstated January 4, 1902, and docketed, No. 73214, and said appeal will now be considered on its merits.

It appears that at the date of the rejection of her claim by the Bureau there was on file in the case a certificate of the governor of the State soldiers' home at Lafayette, Ind., dated July 30, 1900, wherein he certified that—

Christopher Filones, a pensioner, entered this home February 15, 1896, and was readmitted June 3, 1898, and finally discharged November 20, 1899.

This certificate showed that pensioner was an inmate of said home for two months and a day after claimant filed her said claim September 18, 1899.

The Department is of the opinion that as the pensioner was shown to have been an inmate of a State home for soldiers or sailors for over two months after the filing of an application by his wife for division of his pension, under the second proviso of the act of March 3, 1899, the rejection of her said claim on the ground that the pensioner was not, at the date of the adjudication, an inmate of a soldiers' home, was error.

While the Bureau stated, April 25, 1901, that the action appealed from had been receded from, yet no action appears to have been taken by the Bureau to correct the error or to pay her the half of her husband's pension accruing during pensioner's said residence in said State home after she had filed her application therefor.

The pension to which claimant was entitled, assuming that she is a woman of good moral character and in necessitous circumstances, was "one-half of his pension accruing during his residence therein"—i. e., a State home—as provided by the second proviso of said act of March 3, 1899. See recent decision in the case of *Cooper v. Cooper* (12 P. D., 163).

As claimant was, by the Bureau action appealed from, deprived of her share of her husband's pension accruing during his residence in said home, said action is reversed and the papers in the case are herewith returned, with instructions that her said claim be readjudicated in harmony with the opinions herein.

FEE—FORFEITURE—ATTORNEYS—NOTICE.

JAMES MARSHALL (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

1. The fact that an attorney makes contention for a fee for his services in a claim for pension estops him from denying that he has received notice of the allowance of the claim, and that his title to the fee has been denied by the Bureau; and where subsequently to making such contention he acquiesces in the adverse action of the Bureau for one year—that is, fails to enter an appeal to this Department—he thereby forfeits whatever title he may have had to the fee.
2. When an attorney who contends for a fee on the original issue in a claim under the general law subsequently to said issue files in behalf of the applicant a declaration for “additional pension” in which is recited the fact that the applicant is in receipt of pension under the general law, it is presumed that said attorney has received notice of the allowance of the original claim; and where under the foregoing conditions he acquiesces for one year from the date of filing said declaration in the adverse action of the Bureau in refusing to certify to him a fee on the original issue—that is, fails to enter an appeal to this Department within a year—he thereby forfeits whatever title he may have had to the fee.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 21, 1902.*

Milo B. Stevens & Co., of Washington, D. C., on December 26, 1901, entered an appeal from the action of the Bureau in the matter of fee on the issue of January 15, 1891, in the claim for pension under the general law of John Marshall, who served in Company E, Sixty-ninth Ohio Volunteer Infantry.

In behalf of the soldier on March 17, 1880, George E. Lemon (now deceased), of Washington, D. C., filed a declaration for pension under the general law on account of disability due to injury of neck and spine; also in his behalf on November 6, 1882, Mr. Lemon filed another declaration for pension under said law on account of disability due to saber wound of back. He filed evidence in 1880 and 1882, and on September 3, 1884, filed articles of agreement for a fee of \$25. The claim was rejected April 5, 1886, and Mr. Lemon was advised April 14 following of said action and the ground of rejection. He filed evidence to reopen June 5, 1886, and was advised July 16, 1886, that said evidence was not sufficient to change the action of the Bureau. He was again advised September 20, 1886, in response to a communication from him, that the evidence which he had filed did not warrant further action. He was again so advised on January 8, 1889, in response to another communication from him. On January 21, 1889, he filed an argument to show wherein the action of the Bureau in rejecting the claim was improper. Reopening of the claim was recommended January 30, 1890, but the order therefor was canceled. The claim was subsequently reopened, and on March 11, 1890, Mr. Lemon was called

upon to furnish evidence showing from what causes of disability the claimant suffered after his return from prison to the date of his muster out. He filed evidence December 26, 1890, for making the claims special:

J. B. Cralle & Co., of Washington, D. C., December 12, 1889, filed a power of attorney, and on January 24, 1890, filed articles of agreement for a fee of \$25. They were advised, March 11, 1890, that they could not be recognized without the consent of Mr. Lemon. They filed evidence in July and August, 1890, in response to the call of the Bureau of March 11, 1890, made upon Mr. Lemon. They called up the case in 1891, 1892, and 1893, and on March 9, 1897, they filed in the Bureau an instrument which reads as follows:

WASHINGTON, D. C., *March 8, 1897.*

SIR: Referring to the admitted claim for original invalid pension on Certificate No. 520868, under the general laws, in behalf of James Marshall, late of Company E, Sixty-ninth Ohio Volunteer Infantry, we beg to be informed why we were not recognized for a fee upon the disposition of said case.

Our record shows that we filed power of attorney in this claim December 12, 1889, and fee agreements in January, 1890; the testimony of two comrades as to origin of claimant's disabilities; testimony of Dr. Saunders as to treatment, and neighbors Bell and McKay from discharge.

We believe that we should have been recognized upon the disposition of the case, and we ask that the papers be reviewed, in order that our rights may receive the recognition which they merit.

Very respectfully,

J. B. CRALLE & Co.

HON. D. I. MURPHY,

Commissioner of Pensions, Washington, D. C.

On January 15, 1891, certificate issued to allow pension in the claim from date of discharge on account of disability due to injury to neck and spine and saber wound of back. On said issue a fee of \$25 was certified to Mr. Lemon. The appellants, as attorneys for the representatives of his estate, in October, 1901, were called upon to refund the fee in favor of Messrs. Cralle & Co.; hence this appeal.

The title of Mr. Lemon to the fee is denied, in substance, on the ground that he forfeited his rights in the case through his failure to render material service for a period of two years from the date he was notified, July 16, 1886, of the effect of the evidence filed by him June 5, 1886; that by his forfeiture he became in neglect, and while in neglect was superseded in the attorneyship by Messrs. Cralle & Co., who rendered material service. In this particular the Bureau states that on three different dates Mr. Lemon was advised why the evidence filed by him was insufficient; that the only action taken by him was the filing of calls for status and protests or arguments; that—

* * * when an attorney is given information, or in effect called upon for evidence, and takes no action except to file communications giving reasons why the evidence called for is not required, he must accept the consequence if the action taken by him does not accomplish the purposes for which it was intended. The claim was

finally reopened, not because of any action taken by Mr. Lemon, but because of the evidence filed by Messrs. Cralle & Co. in March and April, 1890, at which time Mr. Lemon was in neglect.

The record does not disclose that the case was reopened upon any evidence or through any services other than that filed or rendered by Mr. Lemon. The Bureau's statement that the claim was reopened upon the evidence filed by Messrs. Cralle & Co. is hardly warranted in view of the fact that a call for evidence was made before Messrs. Cralle & Co. filed any evidence, viz, on March 11, 1890. The issue of this call for evidence would constitute a reopening of the case.

It is true, as the Bureau states, that where an attorney is given the status of a claim and takes no action except to submit arguments to show why the evidence called for is unnecessary, he must take the consequences of his failure to comply with the requirements of the Bureau. It is also true that, under the present rules of practice, where an attorney fails within his allotted time to take the steps specified by the rules of practice for the further prosecution of a case, he becomes in neglect, forfeits his rights, and thereupon the claimant is at liberty to appoint another attorney to prosecute the case, who would be recognized by the Bureau; or, even if the claimant appointed another attorney before the attorney of record becomes in default, the former would become entitled to recognition upon the default of the latter, and would be entitled to the fee if he rendered any material service. Such would be the consequence at the present date if an attorney failed to comply with the Bureau's call for evidence, and submitted arguments to show that the evidence called for was not necessary for the purposes of the claim. However, the practice has not always been as stated; in fact, there have been changes in the practice since the title to fee in the present case was first adjudicated, and there is much doubt whether under the practice at that time there was such default on the part of Mr. Lemon as would work a forfeiture of his rights. At the time in question the failure of an attorney to comply with the requirements of the practice did not work an absolute forfeiture of rights; his failure rather conferred upon the Bureau the option to continue to recognize him as the attorney, and a contesting attorney acquired no rights whatever if the Bureau saw fit to continue to recognize the attorney of record. In fact, even though the Bureau, subsequently to the allowance of a claim, reconsidered its action and wished to recognize a contesting attorney, where it has paid the fee to the attorney of record, and had called upon him to refund, the view of the Department was that the latter had equitable rights in the case which could not be ignored. The case of James A. Kirby (10 Fee P. L. Bk., 98), Certificate No. 621786, dated December 26, 1891, is in point. The claim was under the general law, and was filed March 20, 1888, by C. W. Bennett, who filed articles of agreement for \$25, and

in April and June, 1888, filed evidence in support of the claim. On November 9, 1888, he was informed as to the further evidence required, but never filed any additional evidence.

James M. Johnson, of Bowling Green, Ky., July 28, 1890, filed a power of attorney. He was informed by the Bureau May 9, 1891, that Mr. Bennett was the attorney in the claim. Mr. Johnson filed evidence in July, 1890, and in April and May, 1891. Certificate issued July 13, 1891, to allow pension, and on said issue Mr. Bennett was paid a fee of \$25. Subsequently he was required by the Bureau to refund in favor of Mr. Johnson, and thereupon entered an appeal to this Department. In deciding the question, the Department said:

It appears that Mr. Johnson was never recognized by your office as attorney in the claim; all the calls for evidence so far as they were directed to an attorney were sent to Mr. Bennett. In May, 1891, Mr. Bennett was recognized by your office as attorney in the case in the matter of a medical examination by the applicant. In April, 1889, and afterwards, Mr. Bennett made inquiries concerning the case which were not answered by the Pension Office. It appears to the Department that it can not be properly held that Mr. Bennett was displaced as attorney in this case. But the prosecution of the claim dragged along, and the applicant appointed another attorney, who rendered service in completing the claim. There were two attorneys in the case, and the fee should be divided between them. Mr. Johnson had no contract as to the fee. Mr. Bennett should, therefore, be required to refund the sum of \$10 only, which amount should be paid to Mr. Johnson.

It will be noted that Mr. Bennett was clearly in neglect under the present practice, but that his rights were preserved under the former practice because the Bureau had seen fit to continue to recognize him.

The rule would certainly be applicable to this case, within which the facts bring the question at issue. It is by the practice in vogue at the time the claim was pending that the title to fee must be determined, and under such practice Mr. Lemon at least would have title to a part of the fee. His rights can not be determined under the better settled practice of the present time. Investigation is made as to the former practice for the purpose of showing that such changes have taken place; that errors are very liable to be committed when titles to fees long since determined are called into question under the test of the practice of this date. In fact, it may be stated that title to fees prior to 1893 was viewed from an equitable standpoint, though resting in a great measure upon the fact whether the Bureau saw fit to recognize the attorney who claimed the fee; and that it is unsafe to determine a title to fee arising prior to 1893 under any other tests. In the present case it would seem that Mr. Lemon, under the former practice, had title to all of the fee, in view of the fact that Messrs. Cralle & Co. filed evidence within his allotted time and this evidence completed the case.

It is thought that Messrs. Cralle & Co. have forfeited any title to the fee which they may have had. It appears that as early as 1897

they filed a petition in the Bureau for the payment of a fee to them on the issue of January 15, 1891, in this case.

In the case of Milton M. Rappleye (10 P. D., 464) it is held that—

When an attorney acquiesces in the action of the Bureau denying him a fee on an issue to allow pension in a claim for a period of one year from the date he was notified thereof—that is, fails to enter an appeal from said action within the year—he thereby forfeits whatever title he may have to the fee certified on said issue.

In this case it is true there is no record of any notice having been sent to Messrs. Cralle & Co. that the claim had been allowed. However, it appears from their petition set forth herein that they had been informed of the facts, for therein they recite that their claim for fee is for service in the admitted original invalid claim of this applicant under the general law, and they asked to be informed why they were not recognized and paid a fee. By setting forth in a petition for a fee the fact that a claim has been admitted, an attorney is estopped from denying that he has received notice of the allowance of the claim in which he contends for a fee. Also the failure of the Bureau to certify him a fee is tantamount to notice to him that his title to a fee was denied; and if more than a year elapsed from the date of his demand for a fee without his entering an appeal to this Department from the action of the Bureau in not certifying him a fee, he would forfeit whatever title he may have had thereto through his having acquiesced in the adverse action of the Bureau. In this case Messrs. Cralle & Co. did not enter any appeal to this Department until September 4, 1901, or more than four years subsequently to their filing in the Bureau their petition for the payment of a fee to them. It is held that they forfeited their right to a fee, if they had title thereto, through their neglect.

It is deemed proper to state that mere calls for status are not considered as requests or petitions for payment of fees, and therefore the filing of such calls would not operate to charge an attorney with notice of the allowance of a claim. However, a demand for a fee in an admitted claim serves for other purposes than a call for status.

Also in behalf of the claimant, Messrs. Cralle & Co., on April 2, 1896, filed a declaration for additional pension under the general law, on account of disability due to disease of feet, and in this declaration it is recited that the applicant was a pensioner under certificate No. 520868. The fact that Messrs. Cralle & Co. filed said declaration for additional pension would be sufficient to charge them with notice that the soldier's original claim had been allowed, and their silence from the date of filing said declaration would be, not only acquiescence in the action of the Bureau in its disposition of the fee on original issue, but also would be equivalent to an admission that they had no title to the fee.

When an attorney has been paid a fee and it can reasonably be

inferred that contesting attorneys have received notice of the fact that a claim has been allowed and have acquiesced for a reasonable time in the Bureau's disposition of the fee, the attorney to whom the fee is paid should be permitted to retain it as against the claim of such contesting attorneys; and record evidence of notice of the allowance of a claim having been mailed to a contesting attorney or record evidence of the acts of such attorneys pursuant to or in any way based upon such allowance of a claim are facts the evidence of which is sufficiently definite and certain, from which it may be inferred that contesting attorneys have had actual notice of such allowance. When thus notified, if they acquiesce in the Bureau's action in regard to payment of fees they will be held to have forfeited whatever title they may have had to the same.

For the foregoing reasons the action of the Bureau in requiring the appellants to make refundment of the fee in favor of Messrs. Cralle & Co. is reversed.

REDUCTION—RATE—INSANITY—AID AND ATTENDANCE.

LOVELL BULLOCK.

The guardian of the soldier who was formerly pensioned at the rate of \$72 per month for insanity has appealed from the reduction of the rate in the case to \$50 per month for such cause of disability.

The evidence adduced in the case and the findings of a board of surgeons at a recent test medical examination to which the pensioner was subjected, show conclusively that he neither has nor requires the regular personal aid and attendance of another person.

- Held* (1) That inasmuch as there is no provision of law, as is the case in total blindness and in other specific, permanent causes of disability, which prescribes a fixed rate for insanity per se, no matter what the degree thereof may be, neither the \$50 rate nor the \$72 rate should be allowed for such cause of disability unless the degree of disability due thereto is shown to be such as to wholly disqualify the claimant or pensioner for manual labor, and also necessitate either the frequent and periodical or the regular personal aid and attendance of another person. (George Welch, 3 P. D., 121; James Caton, 6 P. D., 159; Eppenetus McIntosh, 10 P. D., 172.)
2. That the question as to whether or not a pensioner requires the personal aid and attendance of another person is not wholly a medical one. (Edmund O. Beers, 7 P. D., 113; John J. Hill, 7 P. D., 142.)

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 22, 1902.*

The appellant in this case, Lovell Bullock, late private Company K. Ninety-fourth New York Infantry, was granted a pension on January 2, 1884, for "insanity, the result of gunshot wound of right arm and erysipelas," at the rate of \$8 per month from July 18, 1864, and \$25 from June 6, 1866, \$31.25 from June 4, 1872, \$50 from June 4, 1874, and \$72 from June 17, 1878; the \$8 rate being the "total of a private,"

and the succeeding rates being the first-grade rate as changed from time to time by various acts of Congress, as per the dates above given.

Long subsequent to the issue of the certificate of pension allowing the rates above set forth the Bureau received information to the effect that the pensioner did not require the regular aid and attendance of another person by reason of his mental condition or on account of physical disability. His mental condition, however, is the only cause of disability for which he has ever been pensioned and on account of which the rate in question was allowed.

In consequence of the said information the Bureau proceeded to investigate the truth thereof by sending the papers in the case to the field with instructions to the special examiner in whose hands they were placed to adduce such evidence as would show, as a matter of fact, whether or not the pensioner both had and required the regular personal aid and attendance of another person; and subsequently the special examiner was directed to take him before a board of examining surgeons with a view to securing a full and comprehensive description of his then existing condition, both mental and physical.

The only evidence taken by the special examiner was the depositions of Alonzo M. Bullock, the brother and guardian of the soldier, and of Mrs. Nancy B. Scott, his sister, with whom he lives. Inasmuch, however, as the statements and admissions of these two affiants tended to show so clearly and conclusively that the pensioner did not, as a matter of fact, have the regular personal aid and attendance of another person, the special examiner probably considered that further evidence along that line was unnecessary; but he did recommend that the soldier be examined by a board of surgeons with a view to ascertaining whether or not there was any apparent reason why he should be accorded such aid and attendance.

Alonzo M. Bullock, the aforesaid guardian and brother of the pensioner, deposed and said:

I am 57 years of age; my post-office address is 580 Union street, Appleton, Wis., and my occupation is that of a clergyman. The above-named pensioner, Lovell Bullock, is my brother and I am his duly appointed guardian. He is pensioned by certificate 255363 at \$72 per month on account of "insanity, the result of gunshot wound of right arm and erysipelas," and which was incurred while a private in Company K, Ninety-fourth New York Infantry.

This pension of \$72 per month commenced June 17, 1878, but I have been his guardian for about eighteen years. My brother is about 68 years of age, and ever since his discharge his mind has not been sound. He has never been confined in an asylum, but always remained at home with his family.

When he first came home from the war my father looked after him, and he lived with our parents until father's death. He never married, and consequently has been cared for by the surviving members of the family. He is now living with my sister, Mrs. Nancy B. Scott, who resides on Second avenue road near the east limit of the city, about 2 miles from the Appleton post-office.

At present he is able to walk about the house and grounds, but he does not go out

far from home without some one with him. Whenever he takes a journey of any distance I, myself, or some one always goes with him.

His eyesight is very poor and is also quite deaf, and he is in other ways considerably disabled.

My sister has to watch him closely for fear he may get into trouble, and is a great care to her. He has many fancies and he thinks he is at times capable of taking care of himself, so of course we humor him, but at the same time keep a watch on his movements.

He has the best care and all the most nourishing food he wants, and while his strength is fair at present, yet he is growing weaker right along.

Nancy B. Scott, his sister, deposed and said:

I am 70 years of age; my post-office address is 59 Second avenue, Appleton, Wis., and the above-named pensioner, Lovell Bullock, is my brother. He draws pension at \$72 per month on account of a gunshot wound which resulted in erysipelas and finally unsound mind.

My brother, the pensioner, lives with me and I get \$8 per week for his board and care. My brother, Alonzo Bullock, is the guardian, and the pension he draws is used for the pensioner's sole benefit. He buys the clothing for pensioner and also pays any debts incurred for him.

As I understand, the guardian keeps an account of all money used for the pensioner and makes a report to the county court.

The pensioner has some property now in litigation, and a part of this money has gone toward the expenses of the lawsuits.

The gunshot wound my brother received caused erysipelas, which went to the head, causing his mind to be unbalanced. At times he seems to be all right, and at others, when he is much excited, he seems to be pretty bad in his mind. He never gets so bad as to rave nor do himself and others any bodily harm.

He is a great reader, and sometimes does a little work around the house, such as chores, splitting wood, or any other light job.

He is able to dress himself and feed himself, and frequently walks down to the city without anybody with him. Sometimes he does a little shopping for himself when down town, and occasionally calls to see some of his friends. I desire to give him all the liberty he can possibly have, and allow him to do pretty much as he pleases. He is past 67 years of age, and was never married. I think possibly his physical condition is better than it has been for the past few years, and perhaps his mind may be somewhat improved, but of course a person who has not seen him for some time might notice an improvement sooner than I would. His hearing and eyesight are not very good, and perhaps that may be one cause for some of his peculiarities.

I am correctly recorded in this deposition.

The objective conditions reported to have been manifested upon medical examination were as follows:

Pulse rate per minute, 84-90; respiration, 18-22; temperature, 98½; height, 5 feet 4½ inches; weight, 143 pounds; age, 69 years.

Insanity: We find no permanent hallucinations or delusions. Claimant is incapable of transacting business. He is allowed small sums of money to make trifling purchases, and sometimes visits stores for that purpose, but he is not trusted with any amount, and his business is all done by his guardian or friends. In the sense of having some one always with him he does not require the constant aid and attention of another person. He is sometimes allowed to go out alone and to remain at home alone.

He dresses, and undresses, and feeds himself, and is particular as to his person.

He shows no signs of destructiveness or violence, but sometimes becomes irritable when thwarted or not humored. His mind is certainly enfeebled. * * *

This claimant is so disabled from insanity as to require the frequent and periodical though not regular and constant personal aid and attention of another person, and is entitled to \$50 a month.

The said report of such examination was returned to the board of surgeons by which it was made for a statement as to their reasons for considering the pensioner to be entitled to a rating of \$50 per month. The board replied as follows:

We consider the condition of his mind is such as to require an attendant to watch over him part of the time. He does not appear able to do any manual labor. His reflexes are unaffected. It does not seem possible to examine his retina.

After due consideration of the foregoing evidence and findings of the examining surgeons, the Bureau advised the guardian of the pensioner that he would, under the provisions of the act of December 21, 1893, be allowed thirty days within which to file competent proof, medical, if practicable, that his ward was so totally and permanently disabled as to require the regular personal aid and attendance of another person; and that in the event such evidence should be unsatisfactory, or should not be furnished, the rate in his said ward's case would be reduced from \$72 to \$50 per month, such action having been deemed warranted by the results of the aforesaid special and medical examinations, respectively.

Pursuant to the said letter of advice, the following evidence in rebuttal of the contemplated action of reduction in rate in the case was promptly filed by the guardian of the pensioner:

Dr. W. A. Gordon, of Winnebago, Wis., testified in an affidavit filed May 29, 1901, as follows:

I have this day made a personal examination of Lovell Bullock, insane, Company K, Ninety-fourth New York Volunteers. I find that Mr. Bullock is insane; that his disease has been practically stationary for many years; that the cerebral disease is not progressive apart from the natural deterioration incidental to age.

By reason of his mental infirmity Mr. Bullock is practically more helpless than a blind person who has full possession of his mental powers.

In addition to his intellectual enfeeblement, he has a large scrotal hernia. He is all but blind in his left eye, and his vision in the right eye is greatly impaired. There is marked ectropion of the lower left lid, and also a chronic conjunctivitis of the left eye.

He is almost deaf in the left ear, and there is a very pronounced dullness of hearing in the right ear, so that conversation has to be carried on in a loud tone if he is to hear it. He also has a well-pronounced paralytic agitans.

All these infirmities would entitle him to a rating, but the mental incapacity is the main disability. He requires and for many years has had constant care and supervision of another person in addition to his guardian.

I made this examination at the request of his brother, who is also his guardian, and who informs me that it is proposed to reduce the amount of the pension now paid to Mr. Bullock. Could you behold the staring, bleary-eyed, trembling, ruptured, feeble-minded wreck of a man, with one foot in the grave and the other very near the edge, you would want to increase his pension instead of diminishing it.

Dr. J. H. McNeel, of Fond du Lac, Wis., testified in an affidavit executed May 22, 1901, as follows:

In the case of Lovell Bullock, insane, Company K, Ninety-fourth New York Volunteers, I have this day made a personal examination of Lovell Bullock and find him insane; that the mental trouble is not progressive aside from the degeneration from increasing age.

While serving as United States examiner of pensions, about the year 1885 (the exact date of which I have no record), the said Lovell Bullock was ordered before our "board" for examination, and to the best of my recollection was adjudged insane at that time. He is still suffering from dementia, and is a mental and physical wreck to that extent that he requires, and has for years, the regular personal aid and attendance of another person. The brain disease and its direful results have rendered the pensioner more helpless than if totally blind with his mental powers fully restored.

Besides his mental trouble, Mr. Bullock had a large right scrotal hernia. He is nearly blind in the left eye and the vision in the right eye is greatly impaired. There is severe ectropion of left lower lid and chronic conjunctivitis of left eye. He is nearly deaf in left ear and great impairment of hearing of right ear, so that conversation has to be carried on in a loud voice and in close proximity to the ear to be understood.

He also has paralysis agitans, more or less general, but most pronounced in the upper extremities. The patella reflexes are abolished.

All of these disabilities should entitle him (to) a rating; but the greatest and main disability is his mental disease.

I am not related to the pensioner, directly or indirectly, in any manner whatsoever, and have no financial interest in this case.

I made this examination at the request of his brother and guardian, who informs me that it is proposed to reduce the amount of pension now paid, at a time in his life when he needs it the most for his proper care and support. To reduce his pension at this time would be a great injustice. Such I do not believe to be the spirit which animates or controls our Government in the care of its brave defenders.

And Dr. J. T. Reeve, of Appleton, Wis., testified in an affidavit executed May 21, 1901, as follows:

At the request of the Rev. A. M. Bullock (the brother and guardian of Lovell Bullock), I have this day examined the said Lovell Bullock with reference to his mental and physical condition, it being represented that medical evidence on this subject was desired by the Pension Office with reference to its bearing on the question of the continuance of his present pension rating.

I have known Lovell Bullock for the last twenty-five years, during all of which time I have regarded him as insane and incompetent to take care either of his property or himself. At the present time I find him to be suffering from dementia, not materially differing from his condition for several years past, but with an increased degree of mental hebetude, and that his condition from this cause alone is such as to make it necessary for him to be under the immediate and constant personal supervision of some other person.

But in addition to his insanity, this man is very nearly helpless from physical causes. He is suffering in a marked degree from paralysis agitans, affecting chiefly the upper part of the body, where it is very general, except the head, but affecting also the lower part of the body to a considerable extent. At my request he attempted to write his name, but stopped when he had written his given name, as if it were completed, and when asked to write the rest of his name he appeared to have forgotten what it was. The result would have been wholly unintelligible except for previous knowledge of what was intended.

He is quite deaf, so that it is difficult to converse with him without getting close to his person and speaking in a loud tone of voice.

He is nearly totally blind in the left eye, the pupil of which is dilated to more than twice the size of the pupil of the right eye. There is also a large and very unsightly ectropion of the left eye and a chronic conjunctivitis of the right eye.

He has a large right scrotal hernia.

As to the extent of his disability, he is, in my judgment, much more helpless than a blind man in full possession of his mental powers, and physically sound except as to his blindness, and I believe him to be from his insanity alone more helpless than a blind man.

As will be observed, each of the above-named affiants testified that he had made a personal examination of the pensioner at the request of the brother and guardian of the latter; and, as will also be observed, each affiant expresses the opinion that the pensioner requires the "regular personal aid and attendance of another person," or that it is "necessary for him to be under the immediate and constant personal supervision of some other person" by reason of his "intellectual enfeeblement" or "mental hebetude." The deductions of these affiants are based principally upon the results of their respective examinations of the soldier, and very probably, upon the statements of his brother and guardian, although two of the said affiants appear to have had some personal knowledge of the pensioner for more or less extended periods of time, and one of them says that during all of the time of his acquaintance with him he has "regarded him as insane and incompetent to take care either of his property or himself."

In the absence of positive proof to the contrary the statements of these gentlemen might, perhaps, be regarded as sufficient to determine the question at issue in the premises, but inasmuch as the question as to whether or not, in a given case, the pensioner both has and undoubtedly requires the regular personal aid and attendance of another person is quite often one of fact rather than of opinion, it is quite evident that when it is shown to be a matter of fact that such pensioner neither has nor requires the regular personal aid and attendance of another person a professional opinion that such aid and attendance is required can not be permitted to outweigh the established fact that it is neither required nor received.

In passing upon the question as to "when insanity entitles to a first-grade rate" the Department held in the case of George Welch (3 P. D., 121) that—

The regular personal aid and attendance of another person contemplated by the act of June 18, 1874, is the same as that which is required by one who is confined in an asylum and whose mental derangement is such as to make personal aid and attendance necessary.

In the case of James Caton (6 P. D., 159) it was held that—

Mere confinement in an asylum does not entitle to the first-grade rate on account of insanity; but to entitle to that rating the degree of helplessness specified by law must be shown.

In the case of Thomas G. Conaty (6 P. D., 238) the rule laid down in the Caton case was reaffirmed.

And in the case of Eppenetus W. McIntosh (10 P. D., 172) it was held:

First. That such personal aid and attendance of another person as it is contended is accorded the pensioner is, necessarily, based upon apprehension that it may be—not upon the fact that it actually is—needed, and it does not therefore come within the purview of the provisions of the act of March 4, 1890, or the act of July 14, 1892.

Second. The allowance of the \$72 rate is not warranted merely because insanity happens to be one of the disabilities for which pension has been granted; but the degree of helplessness specified by law must be shown to exist before title to said rate is established.

In the case of Edmund O. Beers (7 P. D., 113) it was held that—

The regular personal aid and attendance of another person provided by the statute (March 4, 1890) is such "attendance" as is regular from day to day—not simply periodic or at stated intervals, but continuous in the sense that it must be at the command and service of the person whose total and permanent helplessness necessitates the aid and attendance of another person in performing the ordinary and necessary functions of daily life.

It was also held in the Beers case that—

When soldier's disability is the result solely of disease contracted in the service and in line of duty, the question as to whether he is so totally and permanently helpless as to require the regular aid and attendance of another person is not wholly a medical one.

And in the case of John J. Hill (7 P. D., 142) it was held that—

The question as to whether claimant requires frequent and periodical personal aid and attendance is not wholly a medical one.

In the cases cited the rules laid down, as above set forth, were favorable to the contention of the appellants in some instances and adverse in others.

According to the facts presented in this case, the pensioner was adjudged insane some time subsequent to his discharge from the service, and, as hereinbefore stated, his brother was duly appointed as his guardian. His insanity, however, was never of such a type as to make it necessary to confine him in an asylum or elsewhere. He was discharged from the service July 11, 1864, on a surgeon's certificate of disability on account of "scrotal hernia and insanity, the latter incurred since enlistment."

The records of the War Department show that he was wounded in the right arm at the second battle of Bull Run, Va., August 30, 1862, and that erysipelas attacked said wound and "spread over shoulders, anterior thorax, and neck." In his original declaration for pension—by his guardian—which was not filed until July 30, 1883, the allegation was set up that the said wound and ensuing erysipelas was the cause of the insanity for which a pension was claimed; and when such claim was favorably acted upon a legal approval for "gunshot wound of right arm and insanity, a result of the wound and erysipelas" was read

on the brief face. The medical approval, however, eliminated the gunshot wound as a pensionable cause of disability per se, but it was accepted as a factor in the cause of the insanity, the said approval, as spread on the brief face, being for "insanity, the result of gunshot wound of right arm and erysipelas."

It would seem, though, that inasmuch as the records showed that the soldier was discharged from the service on account of "insanity" per se, of service origin, that it was unnecessary to assign any especial cause of such condition. There does not appear to be anything in this case bearing upon this phase of the question beyond the allegations of the guardian of the claimant, which scarcely seem sufficient to determine the etiology of so serious a malady as that involved in this case. However, this point is not involved in the question at issue in the premises.

The above-quoted evidence in rebuttal of the proposed reduction in the case not having satisfied the Bureau that the pensioner actually required the regular personal aid and attendance of another person, formal action looking to the reduction of the then existing rate of \$72 per month to \$50 per month was spread upon the brief face, such reduction in rate taking effect from April 4, 1901, the date of the last quarterly payment to the guardian of the \$72 rate.

It is noted that two of the three physicians, whose testimony is set out above, expressed the opinion that the pensioner in this case is "more helpless than a blind person who has full possession of his mental powers." That loss of reason is a greater affliction than loss of sight is not disputed, but it must be remembered that while Congress has seen fit to provide a specific rate for total blindness, it has made no such provision for insanity, because, perhaps, total loss of the sense of reason can not always be as accurately determined as can the total loss of the sense of sight. Therefore the first-grade rate can only be allowed for insanity where it is satisfactorily shown that the insane person requires, by reason of his mental condition, the regular personal aid and attendance of another person. And, as held in the case of James Caton, hereinbefore cited, "mere confinement in an asylum does not entitle to the first-grade rate on account of insanity."

In an appeal from the said reduction in rate, filed July 17, 1901, the attorneys for the appellant contend that the Bureau erred—

* * * in holding that the condition of the soldier is such as to warrant the reduction of his pension in view of the medical evidence filed.

In view of the fact, as above shown, that the Department has heretofore laid down the rule in numerous cases that the question as to whether or not a pensioner requires either the frequent and periodical, or the regular, personal aid and attendance of another person is not wholly a medical one, the basis of the said contention might well be held to be untenable, as the affiants who gave the testimony referred

to in the said appeal did not testify that, to their personal knowledge, the soldier both had and required the regular personal aid and attendance of another person, but merely expressed the opinion, after examining him, that he needed or ought to have such aid and attendance of another person.

As a matter of fact, it is not shown that the soldier ever had at any time during the whole period he was pensioned at the first-grade rate either the regular or the frequent and periodical personal aid and attendance of another person. The said rate appears to have been allowed in part upon the findings of the board of surgeons by which he was examined September 5, 1883, the only medical examination to which he was subjected prior to the allowance of said pension at such rate. But the only reference to the claimant's mental condition made in the certificate of that examination was as follows:

The applicant answers questions intelligently, but hesitatingly. From the general appearance and manner of the applicant it is our opinion that he is suffering from partial dementia. In our opinion the claimant is unable to perform but little manual labor.

The only other official medical examination ever made of the pensioner was the aforesaid examination of February 20, 1901, which was made at the time the propriety of reducing the rate in the case was being considered. The findings at this more recent examination have already been fully set out herein.

It appears from the testimony of Mrs. Scott—the pensioner's sister, with whom he lives—that he can, and sometimes does, perform a little manual labor about the house, such as splitting wood or other light work and doing chores; that he can dress, undress, and feed himself without assistance; that he frequently walks to town alone, and does a little shopping for himself or visits friends; that he is allowed all the liberty he can possibly have, and permitted to do pretty much as he pleases; that his physical condition seems to be better than for several years past, and that his mind also seems somewhat improved, but that he is getting old and his hearing and eyesight are not very good, which, it was thought, might be responsible for some of his peculiarities.

Even his brother and guardian testifies that he does not have the attendance of another person, except at such times when he goes "far from home" or "takes a journey."

According to the evidence adduced upon special examination, about the only aid and attendance of another person, in addition to that above referred to, that the appellant in this case has ever required or had is a sort of general supervision over his movements—more, however, by reason of apprehension that the services of another person might be required than on account of any actual necessity therefor.

The supervision exercised by the guardian of the soldier over the latter's financial affairs is not such aid and attendance of another per-

son as is contemplated by any act of Congress providing a rate in cases in which the frequent and periodical or the regular personal aid and attendance of another person may be required.

Furthermore, the soldier is shown, from the report of the last medical examination to which he was subjected, and, also, by the aforesaid medical evidence filed in rebuttal of the proposed action of reduction of rate in the case, to be suffering from a number of disabilities for which he is not pensioned and which can not, therefore, affect the rate in the case, namely: Disease of eyes and impaired vision, partial deafness, scrotal hernia and paralysis agitans—the latter, in all probability, due to senile changes.

In view of all the facts herein presented, the Department holds that the action appealed from was not error; the same is, therefore, hereby affirmed, and the papers in the case are remanded herewith.

DESERTION—SERVICE—LINE OF DUTY.

ISAAC B. GOFORTH ALIAS NAPOLEON B. GORDON,

At the time of incurring his alleged disabilities in the Seventh Kansas Infantry, claimant is shown to have been a deserter from Company E, First United States Infantry, and he was therefore not in line of duty.

John Norton (9 P. D., 382); John Sullivan (10 P. D., 55); Lewis Rankin (11 P. D., 373).

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 25, 1902.*

Isaac B. Goforth, alias Napoleon B. Gordon, late private Company E, First United States Infantry and Company K, Seventh Kansas Cavalry, appealed August 25, 1900, from the Bureau action of June 27, 1900, rejecting his old law invalid claim filed January 19, 1891, on the ground that claimant, after a special examination, was unable to furnish proof of existence of piles, deafness, and injury of left leg, and alleged varicose veins, at discharge or for several years thereafter.

The contention is, in substance, that the evidence established incurrence of his disabilities as alleged, and that the Bureau action was not justified by the evidence.

Soldier first enlisted under the name of Isaac B. Goforth, August 15, 1860, and was assigned to Company E, First United States Infantry. The rolls for November and December, 1861, report him: "Deserted November 19, 1861, at Fort Leavenworth, Kans."

He enlisted in Company K, Seventh Kansas Cavalry, December 22, 1861, and was discharged September 29, 1865.

Under the law in force at date of claimant's first enlistment, the term of enlistment in the Regular Army was five years. (See 12

Stat. L., 280, sec. 5.) His term of service in the Regular Army, therefore, did not expire until August 15, 1865.

Claimant alleged in his declaration that in November, 1863, he incurred enlarged veins of leg, result of injury caused by fall of horse, also piles and deafness.

It appears that at the date of the alleged incurrence claimant was a deserter from the First United States Infantry. He was therefore not in line of duty while serving in the Seventh Kansas Cavalry in November, 1863, when he alleges he incurred the disabilities for which he claims pension.

In the case of John Norton (9 P. D., 382) it was held that:

If the disability was incurred in the service under a subsequent enlistment while the claimant was a deserter from a prior enlistment which had not terminated prior to such reenlistment, the claim should be rejected on the ground that the disability was not incurred in the line of duty, but while claimant was absent from his proper command in violation of his former contract of enlistment.

In the case of Lewis Rankin (11 P. D., 373), citing the Norton case, *supra*, and the case of the widow of John Sullivan (10 P. D., 55), it was held that:

It appearing from the official record of this appellant's military service, and from the other evidence in the case, that at the date he incurred the disabilities in the service on account of which he was formerly pensioned, he was in desertion from a prior term of service and was at said time absent from his proper command without leave and not in the line of duty, he is not entitled to be restored to the pension roll under the present rulings and decisions of this Department.

As claimant's alleged disabilities were not shown to have been contracted in line of duty, by reason of his desertion from his first service, it becomes unnecessary to consider the evidence as to the alleged incurrence and continuance since discharge.

Claimant's remedy, if any, is to have the charge of desertion removed from the records of the War Department, on application to that Department.

The Bureau action rejecting his said claim is affirmed upon the ground stated herein.

PRACTICE—SHORT CERTIFICATE—DISABILITY.

CHARLES L. STARR.

If a soldier, sailor, or marine who served in the recent war with Spain incurred, contracted, or received any cause or causes of disability in such service and line of duty which persisted for a sufficient length of time subsequent to the dates of his discharge and of filing his application for pension, respectively, the duration of which can be satisfactorily determined by competent evidence, to amount to a source of actual disability, there is no provision of law or rule of practice by which he can properly be denied a pensionable status during the time he was so disabled subsequent to his filing a formal application for pension. *Provided*, That such pensionable degree of disability was not a mere temporary condition of short duration, indefinite existence, and of unknown or illy-defined extent. (See case of Cassilly C. Cook, 12 P. D., 188.)

In the event the disabilities which the evidence adduced in this case tends to show the appellant suffered from for a period of over one year subsequent to the date of filing his claim for original invalid pension are, or can be, established as of service origin in the line of duty he is entitled to a pension therefor from the date of filing his said claim to the date of the medical examination which tends to show that a pensionable degree of disability had ceased to exist.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 25, 1902.*

The appellant in this case, Charles L. Starr, who served as a corporal in Company D, First Tennessee Infantry, war with Spain, from June 15, 1898, to November 23, 1899, filed a claim for pension February 16, 1900, on account of "disease of respiratory organs, disease of heart, disease of nervous system, and chronic diarrhea or dysentery."

According to an affidavit on file in the case of John J. W. Starr, the father of the claimant, who, it appears, in addition to being a school-teacher, is a pension attorney, the soldier was quite ill at the time his declaration was prepared, and, in consequence of such illness of the son, the said declaration was prepared by the father, who says that, upon the advice of a physician, since deceased, he included "disease of the respiratory organs" among the other causes of disability for which a pension was to be claimed. The son, however, subsequently disclaimed the existence at any time of such cause of disability, and withdrew his claim on account thereof. The claim on account of the remaining causes of disability—namely, disease of nervous system, disease of heart, and diarrhea or dysentery—was rejected June 19, 1901, on the ground that no disability therefrom in a ratable degree had been shown since the date of filing the same.

In an appeal from the said action of the Bureau in the premises, filed September 21, 1901, it is contended by the appellant that the rejection of his claim was an injustice, as—

he believes the evidence on file in the case, including that taken by the special examiner, will show that he was strong and healthy at the time of his enlistment; that he was troubled at various times during his service by reason of the disabilities alleged in his declaration; that he has been disabled in a pensionable degree and required medical attendance during most of the time since his discharge, and that his disabilities are permanent. He believes that he has furnished an abundance of evidence to establish his claim.

Relative to these contentions the Bureau invites attention to the following advisory opinion of the medical referee in regard thereto:

In his original declaration filed February 16, 1900, this claimant alleged disease of the respiratory organs (since abandoned), heart trouble, disease of the nervous system, and chronic diarrhea or dysentery.

The claimant has been twice examined under his claim by the Nashville, Tenn., board of examining surgeons, and the case has been specially examined for the purpose of determining the nature of the disabilities incurred in the service and the claimant's physical condition from the time he returned to his home until the time Dr. Taylor began to treat him in December, 1899.

Upon a careful review of the history of this case, as developed by the records, the reports of the examining surgeons, and the testimony on file, it is my opinion that a permanent degree of disability from the alleged causes has not been shown to exist.

The records of the War Department show that the soldier was treated in hospital while in the service for "mumps, abscess of second toe of right foot, due to bruises in marching, and diarrhoea."

At an examination made of the soldier preliminary to his muster out from the service the only causes of disability that he claimed to have incurred therein were "heart trouble and slight diminution in size of right testicle—due to mumps;" but the only abnormal condition found by the surgeon who examined him at that time was—according to the certificate of the said surgeon now on file in the case—atrophy of right testicle.

The claimant was twice examined by the board of examining surgeons at Nashville, Tenn., the first time on May 9, 1900, and the second time on June 5, 1901.

In the certificate of the first of these two examinations it is reported that there was no disease of the respiratory organs (the claim for which, however, as above stated, was withdrawn by the claimant); that there were some signs of ventricular hypertrophy—with slight irregularity of the heart's action, but no murmurs or other abnormal endocardial sounds; that there was a rectal ulcer about 1 inch in diameter, and a relaxed condition of both sphincters; that the claimant seemed to be in a deeply depressed nervous condition, and unable to take even slight exercise without much depression and undue cardiac excitement; that an analysis of his urine failed to reveal the presence therein of any abnormal constituents; and that he was sallow in complexion, pale, anæmic, and, at that time, unfit for the performance of manual labor.

At the second examination made of this soldier, however, by the same board of examining surgeons, his condition was found to have very materially improved. In fact, it was reported by the board that no permanent ratable disability was found to exist from any cause; and the claimant acknowledged to the board that there had been much improvement in his condition since his prior examination by the said board.

His lungs were found to be normal. As to his heart, it was reported that "there may be slight hypertrophy, but to no marked degree;" and there was no murmur, no oedema, no cyanosis, and no dyspnoea, though there was slightly "increased heart action." There was no disease of the nervous system, the reflexes being normal, and there was no twitching or choreac movements, no depression after exercise, no tenderness along spine, and all muscular movements were normal. There was no evidence of chronic diarrhea or of dysentery, and the rectum was healthy.

It will be seen, then, that aside from some little disturbance of the

heart's action, and possibly some slight hypertrophy of the said viscus, the whole economy was, practically, in a normal condition. It is noted, however, in this connection, that the mother and other relatives of the appellant testified before a special examiner of the Bureau to the effect that his heart had been weak from his birth up to his eighth or ninth year, and it was also brought out on special examination that he had suffered from incontinence of urine from childhood until 1892 or 1893, when, according to his own statement, such disability yielded to treatment and ceased to exist.

A considerable amount of evidence has been filed by the claimant and adduced upon special examination—largely lay evidence, however, and somewhat cumulative, with a view to showing that the appellant contracted certain causes of disability while in the service, and suffered from certain conditions subsequent to his discharge therefrom; but inasmuch as it tends to be shown by the findings of the examining surgeons at the last medical examination to which he was subjected that the disabilities which it is alleged he contracted in the service, and suffered from for a more or less protracted period subsequent to his discharge, had ceased to exist at the date of such examination, it is held that—in the event the cause or causes of any disability or disabilities from which he suffered during the time intervening between the dates of filing his original declaration and of the said second medical examination, respectively, are, or can be, established as of service origin—he can only be considered as having a pensionable status from the date of filing his original declaration to the date of the medical examination which failed to show the existence of a pensionable degree of disability.

The general statutes relating to pensions do not require that a condition or conditions established as of service origin must be shown to be of a permanent character before a certificate of pension therefor can issue; but it is, nevertheless, the established practice of the Bureau, as approved by the Department, to allow a pension only when such conditions are believed to be such as will prove to be more or less continuous in their disabling effects, as such practice is thought to be in accordance with the spirit of the law—otherwise the Government would be placed in the position of paying a pension for a condition that had ceased to exist; and such practice has been deemed all the more advisable since the abolition of the biennial examinations of pensioners. There is, however, no provision of law or rule of practice which denies a pensionable status to a soldier, sailor, or marine who, while serving in the recent war with Spain, incurred, contracted, or received any cause or causes of disability, in such service and in line of duty, which persisted for a sufficient length of time, the duration of which can be satisfactorily shown by competent evidence to amount to a source of actual disability, but which may subsequently be shown

upon medical examination to have ceased to exist in a pensionable degree, such pensionable status to obtain from the date of filing the claim for pension to the date of the medical examination showing an absence or cessation of a pensionable degree of disability; provided that such pensionable degree of disability was not a mere temporary condition, of short duration, indefinite existence, and of unknown or illy-defined extent, but—as was held, in effect, in departmental decision of February 28, 1902, in the case of Cassilly C. Cook (12 P. D., 188), late captain Company M, First Ohio Infantry (war with Spain), such degree of disability should continue for a sufficient length of time, the duration of which can be satisfactorily determined from the facts presented, to justify the allowance of a pension during the time the soldier was so disabled subsequent to the date of filing his claim therefor.

As a matter of course, it is practically impossible to lay down any set rule by which all claims of this character can be determined; but it is believed that the general views herein enunciated can, by the judicious exercise of a reasonable amount of care, be made to apply to analogous cases.

In the case at bar, the time elapsing between the dates of filing the original declaration for pension and of the medical examination tending to show the absence of a pensionable degree of disability, respectively, is a little over fifteen months, during the greater portion of which the appellant, according to the evidence adduced in the premises, was disabled in a pensionable degree. In the case of Cook, herein cited, the period of the existence of a pensionable degree of disability was somewhat longer. Each case of this kind, however, must rest largely upon its own merits as determined by the facts therein presented.

In consequence of the principles herein laid down, it is held that the ground upon which the action appealed from was based is untenable. Such action is, therefore, hereby reversed, and the Bureau will please proceed to readjudicate the appellant's original claim for pension in accordance with the views herein set out.

MARRIAGE AND DIVORCE—ACT OF AUGUST 7, 1882—IMPEDIMENT.

WATIE D. CONKLIN (WIDOW).

Claimant married Harrison Conklin in 1862, and he died in the service in 1864. John Conklin married Jane Conklin in 1864, and while she was living and undivorced married the claimant herein in 1866. The testimony shows claimant to have had no knowledge of the first marriage of John until after his death in 1895, having lived with said John as his wife for nearly thirty years, and having reared a family of four children.

Held: Claimant is the widow of Harrison Conklin, and is entirely free and blameless from any charge of open and notorious adulterous cohabitation with John Conklin.

The act of August 7, 1882, is founded upon a condition implying vitiated morals and a lack of chastity, and does not reach those whose matrimonial relations are illegal from an abstract technical standpoint only and are not tainted with moral turpitude.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 29, 1902.*

Watie D., as widow of John Conklin, formerly a private in Company I, One Hundred and Forty-third New York Volunteer Infantry, filed her application under the general law on February 16, 1897, claim being rejected on November 12, 1897, on the ground that the soldier had a living undivorced wife at the date of his marriage with the claimant, and consequently claimant had never been the legal wife of the soldier. Claimant had been previously married to Harrison Conklin, who died in the service, and she was declared to be his widow under an application filed on November 27, 1897, a pension being paid to her thereunder up to the date of the passage of the act of August 7, 1882, said pension being forfeited from that date on the ground that her alliance with John Conklin was one of open notorious adulterous cohabitation. An appeal from said action was filed on May 4, 1899.

The facts in this case, largely gleaned through special examination, are herewith set forth in narrative form, as such facts will be better understood by so doing rather than from an abstract of testimony from each witness.

Claimant was married on July 2, 1862, to one Harrison Conklin, who died in the service on May 19, 1864. They evidently knew one another for a considerable period of time, and had lived in Damascus, Wayne County, Pa., but she was living in Binghamton, N. Y., at the date of Harrison's death. She returned to Damascus during the fall of 1865, and married John Conklin, on September 5, 1866, living with him as his wife, raising a family of four children, and so continued to live until the death of John on October 14, 1895. After claimant had filed her declaration aforesaid, it was brought to the attention of the Commissioner of Pensions that the said John, when he married claimant, had a living undivorced wife, and that said first wife was still living.

Claimant was interviewed and virtually admitted to having been told of a rumor, never heard by her until after the death of John, that he had contracted a prior marriage. She denied in positive terms that she had ever heard of the matter at any time prior to the death of John, and undertook to assist in getting at the truth. Largely through her means the soldier was found to have been married under the name of John Conklin, to one Jane Conklin, at Monticello, N. Y.,

on April 15, 1864, by the Rev. Mr. Dod, the record of the Presbyterian church of said town disclosing such facts.

Certain persons who were familiar with the early life of all of the parties in question were interviewed and subjected to a careful and searching cross-examination. It was found that there were numerous families by the name of Conklin in Wayne County, Pa., Harrison and John evidently being cousins. The claimant was living in Binghamton, N. Y., when Harrison died, about which time John came home on a furlough, bringing with him one Jane Conkling, whom he passed off as his wife, who, although of his own surname, was not a blood relation. They stayed in Wayne County but a few days, John returning to his command and Jane either going into New York State, or into another Pennsylvania county. John was discharged on October 5, 1865, and returned to Damascus without Jane. It was noted by his acquaintances that he had but little to say regarding his marriage with Jane, and it was suspected at the time that he had heard she was living with another man, this doubtless being the reason why he never resumed matrimonial relations with her. He appears to have lived in this community during the succeeding year, and married claimant on September 5, 1866. Jane was about 18 years of age when she married John, and it is especially noticeable, although the affiants did not say so in so many words, that the community were much in doubt as to whether John and Jane had ever been actually married, or whether the alliance was in the nature of an escapade. No surprise seems to have been expressed by anyone when John married the claimant, and no one has been found who could state that they ever told or hinted to claimant that John had been previously married; in fact, there is a unanimity of opinion among all of the affiants, said opinion being based upon an intimate acquaintance with John, that he was very close-mouthed about his first matrimonial adventure, that the matter was seldom if ever referred to after his return from the service, and that it was extremely unlikely that he ever mentioned a word of the matter to the claimant. The affiants testify with one accord that they never looked upon the marriage of claimant and John in any light other than as a proper marriage, and inasmuch as these affiants are all persons of good moral standing it would seem very probable that, whatever might be the technical legal phase of the situation, the community regarded John and claimant through all of their married life of thirty years as being husband and wife, and did not regard Jane as the wife of John. The only knowledge of the marriage of John and Jane which has been brought home to claimant dates from the time she filed her application for pension in 1897, and while it is impossible to look into one's mind and discover knowledge and thoughts hidden there, yet it is strictly true that there is not a particle of testimony in the case which warrants the conclusion that she had the slightest intimation, until months

after John died, that he and Jane Conklin had ever been married. It is true that during her testimony she varied a little as to the length of time she had known John prior to her marriage to him, and that one or two of her statements as to other trifling and immaterial matters were somewhat conflicting; such fact, however, casts no reflection upon her veracity and honesty of purpose, and it may be truthfully said that she exerted herself in a most commendable degree to unravel the truth of the rumor as to the marriage of John with Jane, and it is largely due to her own careful efforts, which required her personal presence and persistent questioning of strangers, to get at the real facts, and this when it was greatly to her detriment to bring forward proof that the marriage of John and Jane was a legal one.

It is noted that one real ground of action taken in this case is based upon the statement that claimant should be presumed to have known of the marriage of John and Jane long prior to his death. Presumptions, however, must be founded on facts and not upon what may have or what might have been. No knowledge, as has already been stated, had been brought home to the claimant prior to John's death, and there is no ground for a presumption that John would have criminated himself in the eyes of claimant by voluntarily confessing to a prior marriage. The rumor of this former marriage was evidently *sub rosa* in the community after John returned home from the army in 1865, and those interested and who heard the rumor evidently believed that no good end could be gained by bringing up the matter at the time of his marriage with claimant, and after his marriage with claimant the same feeling seemed to exist. Moreover, if John did actually remain silent upon the matter, it would not have been a strange procedure on his part, for it is not an uncommon thing by any means for both husbands and wives to conceal many things from each other, especially regarding questionable matters which occurred during their early life, when a knowledge of such matters could produce no present good, but would be liable to result not only in domestic unhappiness, but perhaps in disaster to those wholly innocent as well as to themselves.

The Department holds, under the evidence, that the claimant's knowledge of the marriage of John and Jane Conklin does not date prior to the period of time in which she filed her application for pension as the widow of John Conklin. It is further observed at this point that while one person evidently did, either in 1896 or 1897, convey some kind of information to claimant, probably indirectly, regarding the rumor of the marriage of John and Jane which had been prevalent over thirty years before, yet it seems to be apparent by the testimony of the said person that such information was not conveyed for the purpose of upsetting the peace of mind of the claimant or for any other ulterior motive, but solely for the purpose of putting claimant upon guard as to a possible obstacle which might arise in

prosecuting her claim for pension as the widow of John; and, as hereinbefore set forth, such knowledge appears to have been used by claimant in a most commendable manner. She did not believe that the rumored facts were true, but she did her utmost to get to the bottom of the whole affair, and by so doing completely overthrew the claim which she was prosecuting.

Concluding, as the Department does, that the knowledge of the marriage of John and Jane does not antedate the soldier's death, the issue immediately arises, Was claimant's life with John Conklin, covering a period from September 6, 1866, to October 14, 1895, one of open and notorious adulterous cohabitation?

While it has been held that the act of August 7, 1882, is not penal in its terms, yet it is not to be disputed for a moment but that the adulterous cohabitation mentioned in the act is, in its nature, immoral and criminal. It is not enough that it be simply illegal from an abstract technical standpoint; the intercourse referred to in the act must be meretricious, and such as is coupled with vitiated morals and a lack of chastity on the part of the one claiming a pension. The willingness to forsake the path of virtue, notwithstanding the fact that the pressure may be superinduced by extreme circumstances, would be necessary to exist before the term "adulterous cohabitation" could apply. Provided the claimant had no knowledge that John Conklin lacked a legal capacity to contract because of a living undivorced wife, but, on the contrary, was without cause for a belief that either John or herself were not free to marry; and provided further, that during their married life of thirty years no suspicious circumstances arose which would indicate that their said marriage was of doubtful character, legally, it is impossible to discover any foundation on which to rest a charge of adulterous cohabitation. Her cohabitation with John was certainly open, and it was notorious enough; but it was an open and notorious bona fide marital relation, not tainted in the slightest degree with anything immoral in the eyes of the community. It was not adulterous within the meaning of the act of August 7, 1882, for it was not of such a nature as would support a charge sufficient to justify punishment, or to deprive her of or to compel her to forfeit any right which she might have, and which might be upset by reason of adultery, and this for the reason that she was entirely innocent of any lack of chastity or of morality, but based her conduct through all of her life upon a warranted belief that her marriage with John was valid, morally and legally.

It may be stated, as incidental to the case, although having no especial bearing upon its legal aspect, that the said Jane Conklin remarried not long after the claimant and John, and has continued in such marriage relation up to the present time.

The Department holds, under the law and facts as herein shown, that the claimant does not come within the terms of the act of August

7, 1882, and that she must be held to be the widow of Harrison Conklin, absolutely free and blameless from any charge of open and notorious adulterous cohabitation.

The case is remanded for reopening and readjudication in conformity with the conclusions herein reached.

JURISDICTION—DIVISION OF PENSION—ACT OF MARCH 3, 1899—
PRACTICE.

MARY F. MILLARD *v.* ISAIAH MILLARD.

Claimant's declaration under the act of March 3, 1899, alleging desertion by the pensioner, her husband, and claiming one-half of his pension, having been filed April 22, 1899, less than six months after the passage of said act, conferred no jurisdiction on the Commissioner to pass on the facts alleged in such declaration, the action holding that appellant was not a person of good moral character and rejecting her claim is reversed. See cases of *Rothery v. Rothery* (11 P. D., 77 and 377), and *Richards v. Richards* (Id., 90).

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
March 31, 1902.*

Sarah S., widow of Isaiah Millard, late sergeant Company A, Seventh Michigan Infantry, and late a pensioner under certificate number 99299, appealed October 14, 1899, from the Bureau action of August 9, 1899, rejecting her claim for division of pension under act of March 3, 1899, filed April 22, 1899, on the ground that she was not of good moral character.

Claimant contends that she is of good moral character.

There is no proof of service of the appeal upon the appellee, who, it appears, died July 5, 1900.

The fact that no notice of the appeal was served on the appellee would, had her declaration been filed subsequent to September 3, 1899, justify a dismissal under the rule announced in the *Ellis* case (11 P. D., 288) and in conformity with rule 14 of Practice, as held in the *Van Houten* case (12 P. D., 157), No. 41 current series; yet in view of the further fact that claimant's declaration was prematurely filed, and that the Bureau never acquired jurisdiction to pass upon the question of her character, it would be doing a manifest injustice to claimant to permit said Bureau action to stand and deny her the right to question the correctness of said adjudication.

Claimant's declaration was based on the first proviso of the act of March 3, 1899, which provides for a division of pension in case a pensioner "shall for a period of over six months desert his lawful wife, she being a woman of good moral character and in necessitous circumstances."

The statutory desertion named in said act could not exist until after the expiration of six months subsequent to the passage of said act. See decisions in the case of *Rothery v. Rothery* (11 P. D., 77 and 377), and *Richards v. Richards* (Id. 90)

Claimant's declaration filed April 22, 1899, under said act of March 3, 1899, based on alleged desertion by her husband, was therefore premature, ineffective, and void, and conferred no jurisdiction upon the Bureau to consider her said claim or pass upon the question of her character.

The action appealed from is accordingly reversed.

EVIDENCE—SURGEON'S CERTIFICATE—RECORD—PRESUMPTIONS.

C. R. BEARDSLEE ALIAS CHARLES P. BARCLAY.

A statement in a certificate of discharge that the disabling cause on account of which the soldier was discharged existed prior to enlistment outweighs and rebuts the presumption of prior soundness (Isaac Williamson, 1 P. D., 7).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, March 31, 1902.

In the above-entitled case a motion for reconsideration of the Departmental decision of February 28, 1902, in the claim of C. R. Beardslee alias Charles P. Barclay, late of Company I, Fourth United States Artillery, was filed March 26, 1902. Claim for pension under the general law was rejected July 25, 1899, on the ground that the deafness alleged was shown by the records of the War Department to have existed prior to enlistment, and said rejection was affirmed on appeal. With the motion was filed a brief, in which counsel seek to invoke the doctrine of estoppel in order to admit the claim. In other words, the brief asserts that because the Government, by and through its agents, accepted claimant as a fit man to be a soldier, after an examination, and afterwards had the benefit of his service, it is estopped from denying that he was sound at enlistment.

Counsel have gone at some length to argue that acceptance in the service is analogous to a judgment of a court of law on the question of prior soundness. The Department is unable to see the similitude from any point of view. It is true that when a soldier is accepted into the service a presumption obtains that he was sound, physically, at that date. It is, however, a mere presumption, which readily yields to proof of a contrary character. (See cases of Nathaniel Cook, 5 L. B. P., 118; Benjamin M. Bordine, 13 P. D., o. s., 335; James Bundy, 1 P. D., 356; Daniel M. Redding, 2 P. D., 167; William J. Brooks, 2 P. D., 269; widow of Charles H. Noble, 6 P. D., 268.)

In the case under consideration the claimant was discharged on the following certificate of the surgeon of claimant's regiment:

I certify I have carefully examined the said C. P. Barclay, of Captain Sodor's company, and find him incapable of performing the duties of a soldier, because of deafness and perforation of tympanum, disabling him one-half. This disability existed before enlistment.

We have here a positive record, made by an officer charged with the duty, and it appears regular in all respects. It is faced only by the presumption of prior soundness.

In the case of Isaac Williamson (1 P. D., 7), the Department held:

A statement in the certificate for discharge that the disability on account of which the soldier was discharged existed prior to enlistment not only outweighs the presumption of prior soundness, or the claimant's allegation thereof, but satisfactorily establishes the fact stated until the same is clearly disproved.

See, also, cases of William Bonner, 1 P. D., 346; Daniel Blake, 3 P. D., 27; Hilliard Preston, 8 P. D., 374; Ransom J. Chase, 11 P. D., 483.

This claimant enlisted in the Regular Army August 24, 1876, and was discharged March 13, 1877. He filed his claim February 20, 1899, twenty-two years after his discharge.

In his affidavit, filed in 1899, the claimant stated the following:

The disability for which I was discharged was my lack of hearing; but (owing to a misunderstood question) the surgeon may have stated in his record of my discharge certificate that my hearing was impaired before enlistment. This misunderstanding occurred in this manner: The surgeon asked me a question which I did not hear, and only guessed at it—the question happened to be whether I was hard of hearing before I enlisted, and I answered “yes,” only to learn, when it was too late, my fatal error.

It is not stated when he did learn of the alleged error in the record. It may have been soon afterwards. If so, the correction should have been attended to then and there. As a matter of fact, it is immaterial when he learned of it, because such a record is not open to impeachment on the statement of a claimant, and can not be impeached at all except on the most positive evidence. Affidavits of laymen made over twenty years afterwards are not sufficient. It is true that when this claimant was accepted into the service he was to be presumed sound; but that presumption is entirely overcome by the record, which stands unimpeached; and having so stood for twenty years, nothing short of positive evidence of fraud or mistake in its making can now disturb it. The Government was not estopped from denying that claimant was sound at enlistment; in fact, a record, of more force in law than any mere presumption, shows he was not sound. The position taken by counsel is untenable and not sustained as the law of this case.

Then, further, the attention of counsel is called to the act of Congress approved March 3, 1885, where the following language is used:

Provided, that all applicants for pensions shall be presumed to have had no disability at the time of enlistment; but such presumption may be rebutted.

The above is a complete answer to the points raised in the brief of counsel. The presumption of prior soundness in this case is rebutted by the record.

The motion for reconsideration is overruled.

DEPENDENCE—WIDOWS, ACT JUNE 27, 1890—ACT MAY 9, 1900.

RACHEL WARNER (WIDOW).

The income mentioned in the act of May 9, 1900, is construed to be that which the widow has, at date of filing claim, as a continuing revenue, from year to year, arising from her property or business or from any sources other than her own labor; and an allotment to her from the soldier's estate under a statute giving a widow and children out of such estate "sufficient provisions or other property to support them for twelve months from" the decedent's death is not necessarily a bar to pension under a claim filed by her several months after his death, but is one item, merely, of income to be considered in connection with other facts showing her general income-producing resources at date of filing such claim.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
April 3, 1902.*

This appellant, Rachel Warner, on January 12, 1901, filed a claim, No. 733177, for pension under the acts of June 27, 1890, and May 9, 1900, as widow of David Warner, who was a member of Company H, Seventy-eighth Ohio Infantry, from September 26, 1864, to May 30, 1865, and who died September 2, 1900.

Said claim was rejected in October, 1901, on the ground that claimant was not dependent under the law, "having an income exceeding \$250, i. e., an allowance of \$300 for year's support."

She was notified of rejection accordingly, and that if now dependent to file a new claim, it being alleged that the soldier's estate is so bound up by adverse litigants that she has no enjoyment of it until the conclusion of such litigation, the outcome of which is uncertain.

Instead of filing a new claim she appealed, through her attorney, November 29, 1901, contending that in rejecting the claim the Commissioner of Pensions disregarded the evidence and also "erred in demanding a new statement of the claim," as the present application "covers all that is necessary to be stated."

It being stated that appellant is now in destitute circumstances, her appeal is considered in advance of its regular order.

There appears to be no question as to the facts in this case. The administrator and the attorney for the soldier's estate testify that said estate, consisting principally of a 70-acre farm in Pickaway County, Ohio, was appraised at \$3,187.56, with \$1,600 indebtedness; that she was allowed, by the appraisers, for her support during the first year of her widowhood, \$300, \$188.75 being in cash and the remainder in personal property—corn, hay, hogs, harness, and household furniture—and that her dower interest will not exceed \$75 per annum during her life. The farm, they say, is rented on shares, her share, after paying for labor and her portion of taxes, amounting to \$75 a year. They state also that she has no other property or means of support.

Said attorney, in an affidavit filed to make appeal special, states

dower in two-thirds of this land is claimed by a sister-in-law of the soldier, and that the small income appellant would receive from the estate is tied up by litigation accordingly.

The question here presented is whether the allowance made appellant by the appraisers for the soldier's estate, which alone constitutes the basis of rejection of this claim, is such as to debar her from pension under the law.

The act of May 9, 1900, amendatory of the act of June 27, 1890, under which amendatory act this claim is filed, provides that a widow shall be pensionable if without means of support other than her daily labor, "and an actual net income not exceeding \$250 per year."

Income is defined both in Webster's Unabridged Dictionary and Bouvier's Law Dictionary as "the gain which proceeds from property, labor, or business." The former adds, evidently as particularizations:

" * * * the produce of a farm; the proceeds of professional business; the profits of commerce or of occupation; the interest of money or stock in funds, etc.; revenue; receipts; especially the annual receipts of a private person, or a corporation, from property; as a large income; a limited income."

It would appear from these definitions that while the word is synonymous in a general sense with "revenue" and with "receipts," yet its primary and generally accepted popular as well as its sole legal meaning, with reference to finances, is receipts only of a certain kind, viz, as profits or gain from capital or principal. Webster, while admitting "receipts" as synonymous with "income," says the latter word signifies "especially the annual receipts * * * from property;" and Bouvier says the word "revenue" is applied especially to the income of governments.

The courts which have construed this word have rendered confusing decisions, the peculiar context or the nature of the instrument or of the law using it evidently influencing the varying decisions and determining the construction given. Some have viewed rather the things to be considered as the income of or from certain property, labor, or business, while others have viewed the property, labor, or business of an individual which may be considered as constituting his source of income.

The court, in *People v. Supervisors of Niagara* (4 Hill, 20), say that, "income when applied to the affairs of individuals expresses the same idea that revenue does when applied to the affairs of a state or nation," and this would seem to be the proper general sense of the word, and as it is used in the act of May 9, 1900. The widow's income there mentioned is evidently intended to be her revenue or receipts from whatever source obtained, and the allowance made to this appellant would appear to be included within this term, it being an element of income and given her by the State law as a means of support, section 6040 of the Revised Statutes (Bates' Annotated) of the State of Ohio provid-

ing that the appraisers of an estate shall allow and set off to the widow and children of a decedent "sufficient provisions or other property to support them for twelve months from" his death.

The statute, act of May 9, 1900, however, raises another question. The words "actual net income per year" would seem to indicate an intention that not merely the net income of one year is to be considered in determining a widow's pensionable status under this law, but her general financial condition, the possession by her of "property or business" (the act excepting her labor) producing or productive of a net income to her annually, from year to year, continuing in its nature, of not less than the sum mentioned in the act, viz, \$250.

It would seem to be a truer construction of the terms of this law, and more consonant with its spirit, to adjudicate these cases upon all the facts and circumstances shown relevant to the widow's financial condition at the time of filing claim, and to allow pension when it appears therefrom that her resources—that from which her income, considered as a continuing factor from year to year, must be derived—are such only as to produce net annually less than \$250.

In this view of the law, the allowance herein for this widow's support is not such an "income" as necessarily and of itself to debar her from pension, but it must be considered merely as one element of her available income, to be considered in connection with all her income-producing resources, existing at the date of filing of her claim, which, combined, may or may not place her in such condition that she has or may have an "actual net income per year" of less than \$250.

In this case appellant's only source of income appears to be the soldier's estate, worth, above indebtedness, less than \$1,600, in which she has only a disputed dower interest, from which she appears to have so far received nothing except this allotment for a year's support, and from which, should she eventually secure her dower interest, she would receive but \$75 a year income, according to the testimony.

This was her general financial condition at the date of filing her claim nearly four months and a half after the soldier's death. At that time her allotment for support had been depleted over \$100 for this period of the year from the soldier's death, and she had remaining less than \$200 worth of property available as income, with the possession in law of the "mansion house," given her by the statutes of Ohio, "free of charge for one year, if dower is not sooner assigned." (Section 4188.)

Under such circumstances the Department is of the opinion that the widow is "without means of support other than her daily labor, and an actual net income not exceeding \$250 per year," and is pensionable accordingly from date of filing this claim.

Rejection is reversed, and you will readjudicate the claim in accordance with the foregoing views.

LINE OF DUTY—BLINDNESS—WOOD ALCOHOL—POISON.

JOSEPH E. HENDRICKSON.

The expert evidence filed in the case since the former decision in the same (10 P. D., 376) was rendered emphasized the conclusions reached in said former decision that claimant's loss of vision was due to wood alcohol poisoning, not due to the service in line of duty, and said decision is adhered to, and the motion to reconsider and set the same aside is overruled.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 7, 1902.

The motion, entered July 6, 1900, by the above-named pensioner (under special act of Congress) for the reconsideration of the departmental decision of October 21, 1899, whereby was affirmed the adverse action of the Bureau in his claim for blindness, alleged to be a result of his military service, and which motion has been held to await your consideration of additional evidence then on file and to be secured, is now ready for final disposition upon your report that the status of the claim is not altered by such new evidence.

That status is fully explained in the original decision, and the only matter now to be determined is whether your conclusion, as announced in the report above referred to, upon the effect of the additional evidence is justified. That is, whether said new evidence is so confirmatory of that previously considered and passed upon as to warrant adherence to the decision which held that claimant's blindness was the result of poisoning by ingestion of wood alcohol and not of malarial infection, contracted in the military service.

Upon this question the opinion of the medical referee, upon which your latest action is based, is as follows:

In accordance with the requirements of the honorable Assistant Secretary of the Interior, the further testimony of Drs. Burnett and Butler and the deposition of Mrs. Hendrickson, the wife of claimant, have been taken.

The cross-examination of Drs. Burnett and Butler thoroughly confirms the action of the Bureau in rejecting the total blindness as not due to the service, but as a result of poisoning by wood alcohol in October, 1898. There is no ratable disability shown by the several examinations from the alleged mountain fever, dysentery, or pneumonia.

The eye lesions resulting from the ingestion of wood alcohol have been studied and observed of late and notably since the rejection of this claim two years ago, at which time the subject was practically new to the medical world, and we know that the case in point is a typical one of optic atrophy resulting from the poisonous properties of wood alcohol.

Before the ingestion of this poison there was no complaint of the eyes except an occasional blurring, quite common after an exhausting sickness; the alcohol was used and in a few days total blindness supervened. No other cause for blindness is shown and no other theory will account for the thoroughly typical chain of symptoms.

It is not necessary to make an extended discussion of this case. This has been done most fully in other papers, and it only remains to say that the new evidence not only

does not change the opinion of the Bureau as to the propriety of rejecting the claim, but furnishes stronger grounds than existed before for regarding such rejection as wholly warranted by the facts presented.

This report fully covers in a succinct form all that is necessary to the proper disposition of the question in issue, and its statements and conclusions being sustained by the facts, it should not be necessary to enlarge thereon. However, for the purpose of emphasizing some aspects of the case, made more plain by the later evidence, and of demonstrating the justice of the action taken, it is deemed proper to rehearse certain facts which combine to show that claimant's blindness is in no sense a result of his military service.

The first of these facts is that the evidence does not show the nature and extent of the malarial poisoning contracted by claimant to have been such as to materially affect his eyes. It was pointed out in former papers, quoting from eminent authorities, that there were cases reported from India and other tropical climates wherein, after a long siege of malaria of a severe type, with meningeal complications, the eyes had been affected to the point of total blindness, but in all ordinary cases the blindness was of gradual development, was more or less temporary, and ceased with the cure of the malaria. The conditions in this claimant's case do not meet any accepted theory or known facts on this subject, for besides the blindness not being of gradual development and temporary in character, it came suddenly and has been permanent after a brief period of improvement following the first failure of sight.

This result, too, came after a limited period of suffering from chills and fever, or intermittent fever, for the most shown by the evidence is that claimant had one severe attack of mountain or malarial fever and one of dysentery in June and July, 1898, while in Cuba. These were followed by a few chills before making the return trip to the United States in August, 1898. On the return voyage and upon arrival at Montauk Point, New York, he was in excellent condition, according to his admission and the evidence. On his arrival at his home in Washington, D. C., September 12, 1898, he was very sick from the effects of overindulgence in liquor the night before, and was laid up for three or four days, after which he probably had an occasional chill during the period up to September 24, 1898, when he was attacked with pneumonia of the right lung, and was thus sick for ten days or two weeks. It was during the latter part of this sickness that he took, by mistake, as stated by his wife, a drink of wood alcohol, followed the next day by the first serious symptoms of impaired eyesight.

It will thus be seen that the malarial poisoning had been of comparatively short duration, and, leaving out the assertions of claimant and his relatives, it had at no time been of a character to indicate serious consequences of any kind. Indeed, according to the testimony regarding it, the infection was no worse than in thousands of cases among

the returned troops about that time, and from which no permanent effects ensued, especially as to the eyesight. Not only so, but it is not shown that claimant took any remedies for malaria which might have produced the blindness, and it is in evidence that the disability was entirely eradicated by January, 1899. There is no pretense or effort to show that dysentery or pneumonia contributed to the impairment of sight.

Another fact which forces itself into consideration is that the first efforts of claimant appear to have been to show that his permanent blindness was the result and gradual development of a series of lesser attacks from various causes, beginning soon after his enlistment. Thus, one comrade testified that claimant had some trouble with his eyes, and complained of it, while the regiment was stationed at Chickamauga, Ga., not long after being called into service. Then at Tampa, Fla., he was heard to complain that the glare of the sun on the white sand hurt his eyes, and later, at the same place, he fell out of ranks during a march because of exhaustion from the heat, and at that time his eyes were red and congested. Again, upon arrival at home his eyes showed the effects of his indulgence in drink, and later the weakness and dimness of vision following sickness were observable.

To attribute the permanent loss of sight to gradual failure occasioned by these affections of the eyes, which occurred from time to time, is entirely inconsistent with the idea that it was the result of malaria, and one or the other theory must be abandoned. It has been intimated that, notwithstanding these various manifestations of eye trouble, there appears to have been no thought on the part of claimant or his physicians that his eyes were actually diseased or his sight in any danger of serious impairment. It was not until the 5th day of October, 1898, as he stated to the special examiner, that he was impressed with the belief that his eyesight was in jeopardy, and this was the day after the ingestion of wood alcohol.

At the time claimant's sight became thus affected it is quite evident the attending physician knew little or nothing of the effects of wood-alcohol poisoning. Indeed, the medical profession generally was not posted on this subject, it being a new phase of disease which had not been scientifically investigated except in a limited way. When the physician found claimant's eyesight was impaired he could only conjecture what the cause might be and recommend the services of an expert oculist. The latter, having only such history of the case as claimant and his friends could give, and probably knowing little more than the attending physician of the peculiar effects of an ingestion of wood alcohol, could only treat the conditions found, although he seems to have been fully aware of the true seat of the disease, as is evidenced by the nature of the prescription given.

When the case was previously considered it was pointed out that the

medical history showed that claimant's blindness was caused by atrophy of the optic nerve, and that the disease commenced in the nerve before it entered the eye; that is, claimant was totally blind before there were any changes within the eyeball. This condition is described by oculists as a postocular neuritis. It was also pointed out that malarial poisoning is not known to produce total permanent blindness without serious disease of the brain, while it is usual for such blindness to follow the ingestion of wood alcohol, without any other manifestation of brain or nerve disease. Furthermore, in cases of malarial blindness the disease is first detected in the back of the eye when there is only slight impairment of vision. In this case the eye ground was found normal even when total blindness existed.

Since the former decision was prepared many more cases of blindness caused by wood alcohol have been reported in the medical press. It is now shown that wood alcohol is so destructive to the optic nerve that even the inhalation of its vapor is sufficient to cause blindness. Dr. de Schweinitz, of Philadelphia, reports a case in the *Ophthalmic Record* of a man who was made blind, in which the pathway of the poison was the lungs. The patient was a varnisher, and he used the substance, in the shape of Columbia spirits, to wash the varnish from his hands.

The whole clinical history of the case under consideration conforms closely to all reported cases of blindness from wood alcohol, and not at all to the effect of malarial poisoning on the eyes, as was indicated in the former decision. Furthermore, the specialists, Drs. Burnett and Butler, and others most familiar with the facts, are now of one opinion on this subject and are fully convinced that this claimant's blindness is solely the result of the ingestion of wood alcohol.

The fact that claimant has even admitted the drinking of the wood alcohol, although he and his friends have endeavored to minimize the quantity taken and to make it appear that he vomited all of it, may make it unnecessary to refer at length to his habits to show that there was probably enough absorbed to accomplish the destructive results. It is in evidence that he was a wild youth; that he was addicted to the drinking of intoxicating liquors for years; that he did not fail to drink all he could get during the service, on more than one occasion being intoxicated, and that his first sickness after arrival at home was the result of overindulgence.

These things, as well as the statement that he mixed the alcohol with sugar and water, would make it most probable that not only did he not know how much he drank, but that he took it with full knowledge of the kind of liquor, his sense of smell being a sure guide, even if he could not see the label, although undoubtedly he did not understand anything of its qualities or effects as apart from those of ordinary alcohol. At any rate, it seems unmistakably true that claimant was

in large measure the victim of his own appetite for liquor, and that his affliction can not be attributed in any manner to disability contracted in service and line of duty.

For the reasons stated the motion for reconsideration is overruled, and the papers are herewith returned.

SERVICE—DRAFTED MAN AND SUBSTITUTE—DISCHARGE—ACT OF JUNE 27, 1890.

WILLIAM H. VEACH.

Appellant was enrolled and accepted as a substitute September 27, 1864, rejected by board of medical inspectors November 17, 1864, ordered by Major-General Hooker to be discharged November 28, 1864, and was discharged March 15, 1865, on account of disability existing at time of enrollment. *Held:*

1. That the status of appellant from the time of his acceptance by the board of enrollment, September 27, 1864, to the time of his discharge, March 15, 1865, for disability existing at the time of enlistment, was that of a soldier accepted into the service of the United States, but not assigned to duty as such for the reason that he was physically disqualified to perform military service from causes existing at the time he was accepted.
2. That as appellant was not assigned to any military organization nor to military duty, he did not render to the United States any military service, and hence did not serve for ninety days in the military or naval service of the United States, as contemplated by the act of June 27, 1890, and is not pensionable under section 2 of said act.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 10, 1902.

March 26, 1900, William H. Veach, unassigned substitute, Second Congressional district of Indiana, filed a claim for pension under section 2 of the act of June 27, 1890, which was rejected August 7, 1900, on the ground of "soldier not having rendered naval or military service for ninety days during the war of the rebellion." From this action an appeal was taken February 20, 1901.

The records of the War Department show that appellant was enrolled as a substitute, Second Congressional district of Indiana, September 27, 1864, at Jeffersonville, Ind., for one year; was received at "draft rendezvous" September 29, 1864, and rejected by board of medical inspection November 17, 1864, on account of disability existing at time of enlistment. Papers were sent to department headquarters November 18, 1864; were approved by the medical director November 23, 1864; ordered to be discharged by Major-General Hooker November 28, 1864, and the papers received back November 29, 1864. His formal discharge was dated Indianapolis, Ind., March 15, 1865.

The facts in the case are very similar to the facts appearing in the case of Elizabeth H. Poland for pension as the widow of Nicholas Poland, substitute, Sixth Congressional district of Indiana (8 P. D.,

266), wherein it was decided, in conformity with the opinion of the Judge-Advocate-General of the Army, that soldier was in the service of the United States for ninety days during the war of the rebellion.

The only difference in the two cases is that in the Poland case the soldier, in addition to being accepted by the board of enrollment, was mustered into the United States service, while this appellant was accepted by the board of enrollment, but was not mustered in in addition to this.

In the opinion referred to the Judge-Advocate-General said:

Referring to the case of Edward Nelson, reported on November 23, 1891, it now appears that I was mistaken in considering the "rendezvous board of medical inspection" as being the board of enrollment. It appears that this man was actually passed and accepted by the board of enrollment, but was afterwards reexamined by another board not provided for in the act of 1863, and rejected and discharged. According to this he was in the service from the date of his acceptance by the board of enrollment until his discharge, after rejection, by the rendezvous board of medical inspection.

There is no material difference between the case of Edward Nelson and the one here under consideration. In the Nelson case, Nelson himself was drafted, and in this case Pence was drafted and Poland was substituted for him. Poland being substituted for Pence, it was right and proper to treat Poland as Pence would have been treated if Poland had not been substituted for him.

It was not necessary at all to muster in drafted men or substitutes of drafted men. A muster in is a mere matter of formal acceptance of the man by the Government, and it is the usual manner of formally accepting men who enlist in the ordinary way. But the draft act of 1863 provided a different manner of accepting the men who were to be brought into the service by means of its provisions, viz, by acceptance by a board of enrollment.

It will be noted that Poland, besides being accepted by the board of enrollment September 26, 1864, was also mustered in on that day by the provost-marshal. That is, besides being accepted by the board, as provided by the law under which he was being brought into the service, he was also mustered into the service as it would have been proper for him to be if he had been enlisting in the ordinary way. This muster in must be held to have had no more effect than a second muster in of a man who had enlisted in the ordinary way would have had. It was superfluous, and its record in the papers on file must be treated as surplusage.

In answer to the question asked by the chief of the Record and Pension Office in his indorsement quoted above, I would say the decision in the Nelson case should be held to apply to substitutes, because drafted men who were forced to enter the service and substitutes of drafted men who entered the service, in lieu of the men drafted, stand on the same footing and should be treated alike. A name not drawn is substituted on the list of those drawn for a name that was drawn, and the name substituted and the person who bore it are treated as if that name had been drawn instead of the one for which it was substituted.

In answer to the three questions asked by the Secretary of the Interior, I would say that there was a legal acceptance of this man into the United States service by the board of enrollment September 26, 1864, and that he remained in the service from that time until discharged pursuant to the order of the department commander.

It should be noticed that the board of enrollment did not discharge or reject him, but accepted him. In this case, as in the Nelson case, there were two boards. One was provided for by law and was a part of the machinery by which the men were brought into the service. The other was provided by the military authorities, and had to do with men in the service.

It should be noted also that there were two draft rendezvous. One was in the draft district and was the place where the civilians whose names had been drawn were required to report and be examined for acceptance into the service by the board of enrollment. Those who were not accepted were rejected by the board of enrollment and sent back from that point. The other draft rendezvous was at Indianapolis—the general rendezvous—and was where those who had been accepted into the service were sent to be organized, assigned to regiments, etc.

At the general rendezvous there was the medical board which dealt with the men as soldiers—as men then in the service—and when that board found a man whom it considered to be not fit for the service it reported him for discharge, giving his disabilities, and the man was regularly discharged from the military service and given a discharge certificate and final statements. The legal effect of such a discharge is the same as that of a discharge for disability given to any other soldier. In fact, after the drafted man or the substitute of a drafted man was accepted by the board of enrollment his status was simply that of a soldier, and from that time on there was no difference between his condition and that of any other soldier who had been accepted into the service of the United States by formal acceptance of the board of enrollment, by formal muster in or otherwise.

It follows from the foregoing that the above question of the Secretary of the Interior “as to what is the legal effect in general of a discharge in any case of a drafted man or substitute, given in pursuance of a rejection upon physical examination at draft rendezvous,” requires, for an answer, an explanation that there were in Indiana a general rendezvous and also a district rendezvous for each draft district in the State; that there was a physical examination of drafted men and substitutes by the board of enrollment at the district rendezvous; that a drafted man who was rejected at the district rendezvous by the board of enrollment was not accepted into the United States military service at all, but was discharged from his liability to be required to serve under that draft; that a rejection by a board of enrollment at the district rendezvous of a person offered as a substitute prevented him from ever becoming a substitute at all; that the board of enrollment did not accept the person offered and release the drafted man for whom he was offered from his obligation to enter the service himself, except by accepting the person offered into the military service of the United States as a soldier to serve in lieu of the man drafted; that he became a substitute only by becoming a soldier and thereby fulfilling the drafted man’s obligation to become a soldier; that there was a board at the general rendezvous which made physical examinations of drafted men and substitutes who had been accepted by the board of enrollment at the district rendezvous and had thereby become soldiers; that when this board reported adversely on a man the certificate of disability was made out and his discharge from the service recommended, and if this was approved by the department commander the man was discharged from the service, and that this discharge had simply the effect of an ordinary discharge of a private soldier for disability.

The duplicate discharge in this case states that—

William Veatch, a substitute for C. Elrod, drafted Second Congressional district, was enlisted by J. B. Morriwether, captain and provost-marshal of the Second Congressional district of Indiana, at Jeffersonville, Ind., on the 27th day of September, 1864, to serve one year.

It was dated “Draft Rendezvous, Indianapolis, Ind., November 17, 1864.”

Then follows the surgeon’s certificate of disability, and closes thus:

Discharged this 15th day of March, 1865, at Indianapolis, Ind.

HENRY B. CARRINGTON,
Brigadier-General, U. S. Volunteers, Commanding Draft Rendezvous.

The report from the War Department shows that he was received at the draft rendezvous at Indianapolis, Ind., September 29, 1864, "substitute from Second Congressional district, Indiana," and rejected by the board of medical inspectors November 17, 1864.

The act of March 3, 1863 (12 Stat. L., 732), referred to in the opinion of the Judge-Advocate-General, provided (section 8):

That in each of said districts there shall be a board of enrollment, to be composed of the provost-marshal as president and two other persons, to be appointed by the President of the United States, one of whom shall be a licensed and practicing physician and surgeon.

Section 14 provided:

That all drafted persons shall, on arriving at the rendezvous, be carefully inspected by the surgeon of the board, who shall truly report to the board the physical condition of each one; and all persons drafted and claiming exemption from military duty on account of disability or any other cause shall present their claims to be exempted to the board, whose decision shall be final.

Section 13 provided:

That any person drafted or notified to appear as aforesaid may, on or before the day fixed for his appearance, furnish an acceptable substitute to take his place in the draft.

It is manifest from the reports of the War Department and the duplicate discharge filed with the papers in the case that appellant was accepted by the board of enrollment of the Second Congressional district of Indiana and forwarded to the general-draft rendezvous at Indianapolis, Ind., where he was again examined by "the medical board of inspection at that rendezvous" and his discharge ordered. The Judge-Advocate-General says it "was not necessary at all to muster in drafted men or substitutes of drafted men," the draft act providing "a different manner of accepting the men who were being brought into the service by means of its provisions, viz, by acceptance by the board of enrollment," and that in the Poland case his muster in was of no more effect than a second muster in of a man who had enlisted in the ordinary way.

So, under the Poland case, and the law as construed by the Judge-Advocate-General, the status of appellant from September 27, 1864, when he was accepted by the board of enrollment, to March 15, 1865, when he was finally discharged on surgeon's certificate of disability, was that of a soldier.

In the case of Poland, he was accepted by the board of enrollment September 26, 1864, examined by the board of inspectors September 28, 1864, and rejected, was furloughed November 1, 1864, presumably to await discharge, and finally discharged on surgeon's certificate of disability January 20, 1865. But thirty-six days elapsed between the date of his acceptance into the service and the date of his furlough, but he was adjudged to be entitled to a pension.

The decision in the case of Nancy Rathton (9 P. D., 162)—citing the cases of George W. Fleck (7 P. D., 343) and Albert K. Ransom (5 P. D., 184), which latter case was, in so far as it held that the period for which paid was to be taken as determining the period of service, overruled in the case of George W. Hill (7 P. D., 235)—overruled so much of the Poland case, *supra*, “as implied that claimant was entitled to pension under section 3 of the act of June 27, 1890.”

In the decision in the said Rathton case it was said:

Congress in this act (June 27, 1890) provided for those who served, and the man who is sent home to await discharge on account of disabilities which disabled him from serving as a soldier, and which disabilities had existed at the time he enlisted as a substitute for a drafted man, who was presumably able to perform service, did not, in my opinion, serve within the plain meaning of that word as used in said act.

In the case of John S. Robinson (11 P. D., 390), it was said (syllabus) that—

Claimant was enlisted as a substitute in the service of the United States and was carried on the rolls as such for a period of more than ninety days, when he was discharged as rejected for disability by a board of inspection. He was not assigned to any company, and did not serve in the military service in the sense contemplated by the act of June 27, 1890, and is not entitled to pension.

In the case of George W. Fleck, heretofore mentioned, it was held that—

Where the soldier's only service was compulsory in compliance with the sentence of a court-martial and consists of confinement at hard labor with forfeiture of pay and allowances, due or to become due, and the term of his military service being postponed by the terms of his sentence, he can not be held to have served in the military or naval service of the United State during the war of the rebellion, within the meaning of the act of June 27, 1890.

In the case of Ransom, which was decided September 12, 1891, and may properly be called a contemporaneous construction of the act of June 27, 1890, it was said:

Ordinarily a man is said to be “in the service” from the time he takes upon himself the obligation to render service until he is relieved from that obligation, or, in other words, from the time of his enrollment until his discharge. The phrase has thus acquired a kind of technical sense, signifying under an engagement or contract to serve. It is noteworthy, in this connection, that the act of June 27, 1890, under which this claim is made, does not confer pensionable rights upon those who were “in the service” ninety days, but upon those who *served* ninety days, so that it may be conceded that the claimant was in the service for nine months in the technical sense above indicated, without conceding his right to pension.

In the case of the *United States v. Johnson* (124 U. S., 253), cited in the Ransom case, it was said that—

The contemporaneous construction of the statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned, except for cogent reasons, and unless it be clear that such construction is erroneous.

The case of Ransom (5 P. D., 184) has not been overruled, except in so far as it held that the period for which paid was to be accepted

as the period of pensionable service under the act of 1890, and it is the settled rule of the Department that those "who served ninety days or more in the military or naval service of the United States during the late war of the rebellion," as contemplated by section 2 of the act of June 27, 1890, are those, and those only, who actually rendered military or naval service to the United States for that period, regardless of the period during which their names were carried on the rolls. between enlistment and actual formal discharge, as being in the United States service.

In this case appellant was not assigned to any company, nor to any military duty, and did not render any military service to the United States, as contemplated by the act of June 27, 1890, and is not entitled to pension under the provisions of section 2 of said act (John S. Robinson, 11 P. D., 390).

Your action is affirmed.

MARRIAGE AND DIVORCE—EVIDENCE—PRESUMPTION OF DEATH.

MARGARETTE E. HARNDEN (WIDOW).

The fact that claimant's husband deserted her in 1849, of itself, does not raise the presumption that he was dead in 1861, when she married soldier (Rosie Wilson, 6 P. D., 133; Pythia Ann Sullivan, 7 P. D., 512; Mary A. Warburton, 7 P. D., 49; and Helen L. Pepper, 9 P. D., 500); but the fact of claimant's marriage to the soldier in 1860 or 1861, under the belief that her first husband was dead, her continued cohabitation with him as his wife until his death, thirty-seven or thirty-eight years thereafter, the rearing of a family of children recognized by the soldier and herself as their legitimate children, and the fact the first husband was never heard of since 1849, are circumstances from which it may be inferred that said first husband was dead when claimant married soldier in 1860 or 1861; and that the presumption, from the facts, of innocence and morality outweigh the presumption of the continuance of the life of said first husband, Rider, and claimant's marriage to the soldier was legal.

The case of Margaret J. Anderson (4 P. D., 67) is overruled.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
April 10, 1902.*

On June 27, 1898, Margarette E. Harnden filed a claim for pension under section 3 of the act of June 27, 1890, as the widow of George M. Harnden, who served as a private in Company F, One hundred and forty-eighth Pennsylvania Volunteer Infantry, which claim was rejected in your Bureau September 8, 1898, "on the ground of the claimant's declared inability to show, by any competent evidence, the death or divorce of her former husband, and thereby establish the legality of her marriage to the soldier."

From this action an appeal was filed September 12, 1899, in which it is contended, in substance, that, first, in accordance with the statute of Pennsylvania in force at the time of the separation of claimant and

her first husband, his continued absence made it lawful for her to remarry, he having been absent seven years; second, that she had been separated from her said first husband a longer period of time than required by the statute; third, that claimant used her best endeavors, by writing and inquiries, prior to her marriage to soldier, to ascertain her said husband's whereabouts, but was unable to do so; fourth, that since her marriage to the soldier she had endeavored to ascertain the whereabouts of her said first husband, but was unable to gain any information concerning him; fifth, that the legality of her marriage to the deceased soldier has never been questioned by the people where her separation from her first husband took place, or in any community in which she has ever after lived, and that she and her deceased husband, the soldier, reared a family of children legally acknowledged as theirs by the laws of Pennsylvania and Ohio; and, sixth, that the law has been misconstrued and misinterpreted, as she has been recognized as the lawful wife of the deceased by different Commonwealths and by court decisions under their statutes.

The only evidence relative to a former husband was related by the claimant, who swears that she was, prior to her marriage to the deceased soldier, married to one Henry Rider, who deserted her about September 1, 1849; that she has inquired about him and has been unable to ascertain any information as to his whereabouts and does not know whether he is dead or alive, but thinks he is dead, as she has been unable to obtain "any clue to him" after using all the means in her power to do so.

There is no record of her marriage to the soldier, as no public records were kept in Pennsylvania at the time of said marriage, which, it is alleged, occurred in 1861. It is shown, however, that claimant and soldier lived together in the relation of husband and wife from about 1861 to the time of the soldier's death in June, 1898.

The question raised by the appeal is, were claimant and soldier legally married? In other words, does the evidence warrant the presumption that claimant's first husband was dead when she married the soldier?

As said before, the only evidence bearing on the question comes from the claimant, who says her first husband deserted her. She gives no particulars about such desertion, nor the circumstances attending his departure.

It has been suggested that the decision in the case of Margaret J. Anderson (4 P. D., 67-74) should govern in this case.

An examination of the reports of the decisions of this Department in pension and bounty-land cases shows that said Anderson case has been mentioned but once, and then with disapproval in connection with the cases of Amy P. Sheets (3 P. D., 293) and Nancy J. Dorlas (5 P. D., 230). See case of Louisa S. Hoepfner (9 P. D., 497).

While said Anderson decision has not been specifically overruled it was overruled in general terms in the case of Ann Eliza Server (7 P. D., 468), wherein it was stated (text, p. 474) that "The cases of Nancy J. Dorlas (5 P. D., 230), and Amy P. Sheets (3 P. D., 293), and all other cases in conflict herewith are overruled."

Said decision in the case of Margaret J. Anderson (4 P. D., 67) is, however, hereby expressly overruled.

The decision of the Pennsylvania courts, in which State this marriage was contracted and consummated, recognize the common-law rule by presumption of death from long and continued absence without being heard of.

In the case of Miller et al. v. Beates and another (3 Serg. & R., Pa., 490), it was held (syllabus) that—

Where a person has been absent many years without being heard of, and no circumstances appear to account for it, a jury may and ought to presume his death.

In that case it was proved that the person whose death was presumed went beyond the sea unmarried, many years ago, and the last that was heard of him was by a letter from himself to his father, dated Bordeaux, November 24, 1802, in which he mentioned that he should endeavor to get a passage to the United States, and hoped to be in Philadelphia the next summer. Pains had been taken to ascertain whether he had died in France, but no evidence of his death could be obtained.

It seems that but two of the judges of the supreme court sat in the case—Tilghman, C. J., and Duncan, J. The chief justice, among other things, said:

The common law has fixed no period after the expiration of which death should be presumed. But there are two statutes in England creating a presumption in certain cases. By the statute punishing bigamy as a felony, which does not extend to Pennsylvania, because it was made in the first year of James I (before the grant to William Penn), there is an exception in favor of persons whose husbands or wives have been continually remaining in parts beyond sea for seven years before the second marriage, or who have been absent within the King's dominion for seven years without being known to be living within that time. And by the statute of 19 Car., 2, c. 6 (which extends to Pennsylvania), it is enacted that if any person or persons, for whose lives estates are granted, absent themselves for seven years together, and no evident proof be made of their being living, in any action commenced by the lessors or reversioners for recovery of the premises, they shall be counted as dead. The courts in England have adopted and extended the principle of these statutes to cases not comprehended in them; to the case, for instance, of a person seized of lands in fee simple, who has been absent beyond sea, without being heard of, for seven years. But it is contended by the counsel for the defendants that there is a wide difference between cases affecting *real* and *personal* property. In case of real property no great harm is done if the presumption should prove false by the absentee, who was falsely presumed to be dead. But where money is paid on a false presumption it may be lost; because, although an action would lie for the recovery of it against those to whom it was paid, yet they may be insolvent. It is true that there is a difference between land and money, and that the injury may be greater to the absentee when his money is paid away than when his land is taken possession of.

And yet we do not see that the English courts have acted on that distinction; for in *Phill. Evid.*, 152, it is said that in an action of *assumpsit* against a woman who pleads coverture it is not sufficient for her to prove that she was married to a man who went beyond sea twelve years before the commencement of the action; unless she prove also that he was *alive within seven years*, because, without this additional proof, *the jury might presume that he was dead at the time of the promise*. There are certain rules by which jurors ought to govern themselves, although it is their right to decide facts. Whether a man was alive or not at a certain time is a fact which the jury must decide; and yet if, under certain circumstances, the probability of death is great, it may be said that the jury ought to presume the death without positive proof. There is no positive law fixing the presumption of the payment of a bond; and yet, if the interest has remained unpaid for twenty years and there is no circumstance accounting for this long cessation of payment, there arises so strong a presumption of the satisfaction of the debt that the jury not only may but ought to presume it, and unless they do, the court would order a new trial. Still payment is, in its nature, a fact to be decided by the jury. It is so with all other presumptions. Now as to the proof of death; when a man has been proved to be living, the first general presumption is that he continues to live, unless the contrary be proved; the proof of death is thrown, therefore, on the party who asserts it. But there may be circumstances which destroy the first general presumption of life and induce a contrary presumption, viz, of death; and in such case the burden of proving the life will be thrown upon the party who asserts it. For instance, although a person who has gone from Philadelphia to France may be presumed to be living, although he is not heard of for several years, because such things commonly happen; yet, when *many years* have elapsed without hearing from him, and no circumstance is shown by which this may be reasonably accounted for, it is so contrary to general experience that he should be living that the jury may and ought to presume his death. For, in such cases, what is to be done? The jury must find the fact one way or the other. They are not to give a verdict by caprice, but upon principle. Therefore, when a man's being alive is inconsistent with the other fact proved in the cause, according to general experience, it ought to be presumed that he is not alive. I find it laid down in 2 Peake's *Law of Evid.*, 356, that where one has not been heard of for *many years*, this is *prima facie* evidence to presume his death without issue, until the contrary be proved. This appears to me quite reasonable. *Many years* is an indefinite expression. I am not for fixing, at present, any precise period after which a presumption of death arises. But I think myself safe in saying that in the present instance, considering that fourteen years and nine months had elapsed between John G. Schlosser's being last heard of and the commencement of this action; that when last heard of he was at a place between which and the city of Philadelphia there was a free communication, and it was then his intent to return soon to Philadelphia; his being now in life would be contrary to the usual course of things; that the jury might and ought to presume his death, and if the case were to come to another trial the court would so direct them.

Justice Duncan rendered a separate opinion, but to the same effect, in which he said:

This case does not fall within any statutory provision. The evidence to establish the fact of the death of John G. Schlosser, without issue, must be by common law proof. John G. Schlosser, being once in existence, it is incumbent on the party claiming on the allegation of his death to prove that fact by satisfactory evidence. This the law does not require to be by positive proof of the fact; but like all other facts, may be made out by the best proof the nature of the fact is capable of—circumstantial evidence. Now, here the proof does not depend on evidence of absence beyond sea for seven years, but for nearly fifteen years. The last account we have

of this man is from himself. He was then free, and not under any duress. He might go where he pleased; and he declared his intention to return to his native country, and to his father, as soon as he could procure a passage. Inquiries have been made at Bordeaux, the place where he was proven last to have been, and no account *obtained* of what had become of him. This causes a presumption of death, sufficient to repel the general presumption of life. It is *prima facie* evidence of his death without issue, and throws off from the person alleging death the positive proof of that fact, and casts the burden of the proof of life on the party alleging it.

Justice Duncan concludes his opinion as follows:

I am therefore of opinion that sufficient evidence was given to rebut the presumption of John G. Schlosser being in existence; and that the *prima facie* evidence of his *death*, without issue, cast on the defendants the onus of proving him *alive*, or that he left issue, and that it would have been the duty of the judge so to have instructed the jury.

Thus it appears that the death of a person may be presumed, under the decisions of the Pennsylvania courts, from seven years' absence unheard of by those who (if any) would naturally have heard of him had he been alive. See also, cases of *Holmes v. Johnson* (42 Pa. St., 159); *Innis v. Campbell* (1 Rawl., 372); *Bradley v. Bradley* (4 Whar., 173); *Burr v. Sim* (Id., 149), and *Senser v. Bower* (1 P. and W., Pa., 450).

In the case of *Holmes et al. v. Johnson* (42 Pa. St., 159) one of the questions at issue was whether Isaac Johnson was living; and Lavinia Johnson was called for the plaintiff and examined as a witness. In her examination in chief she said:

Isaac was my husband; he went away to sea in 1823, and has not been heard from since.

Upon cross-examination, she said:

My husband has never been heard from since he went away in 1823. He went to sea. * * * When I came to Philadelphia I heard my husband was living in Portland, Me., and had another wife living. I last heard from my husband in 1832. It was rumored he had another wife living. I wrote two letters to him, but never got any answer.

Upon this the court instructed the jury that the presumption was that Isaac Johnson was dead, which was excepted to.

Counsel for plaintiff in error argued that—

The instructions of the court concerning the presumption of death of Isaac Johnson arose from a misconception of the testimony of the only witness to that point. The undoubted presumption from this testimony is the continued life of a man who was living when last heard from. There is no ground whatever from which a counter presumption could arise. Not even had the death of Johnson ever been rumored, and the length of time that had elapsed since the person in question was heard from is very simply accounted for by the fact that he lived at a very great distance from his wife and in an unlawful connection with another woman, with every motive for keeping beyond the reach and knowledge of a former wife, who could and probably would cause his arrest on a criminal charge when his whereabouts became known to her.

But the supreme court on appeal said:

Lavinia Johnson proved that her husband, Isaac, went to sea in 1823 and had not been heard from since, except that in 1832 it was rumored that he was living in Portland, Me., and she wrote two letters to him, but never got any answer. Here was an interval of twenty-seven years from even the last rumor to the commencement of this suit, and this lapse of time surely justified the court in charging the jury, "The presumption under the evidence is that Isaac Johnson is dead. There is sufficient to justify the jury in so finding." The authorities upon this point are conclusive both in England and Pennsylvania.

But it will be observed that it was not shown in evidence that there was any foundation for the rumor that said Johnson was living and had another wife.

In volume 1, American and English Encyclopedia of Law, page 37 (note), the rule is thus stated:

The rule of law is that upon a person's leaving his usual home and place of residence, for temporary purposes, and not being heard of or known to be living for the term of seven years, the presumption is that he is not alive. It must appear that he has not been heard of by those persons who would naturally have heard from him during the time had he been alive. The rule, however, does not confine the intelligence to any particular class of persons. It may be to persons in or out of the family. The mere failure to hear from an absent person for seven years who was known to have had a fixed place of residence abroad would not be sufficient to raise the presumption of his death, unless due inquiry had been made at such place without getting tidings of him.

Absence of a person alone does not raise a presumption of his death; but such absence, in connection with surrounding circumstances, such as the failure by his family and friends to learn of his whereabouts, his character, and business relations, together with the fact that he was last known to be seen near the place where a murder is supposed to have been committed and the reputation in his family and with his friends that he is dead, creates a very strong presumption of death, the law being satisfied with less than certainty, yet requiring a preponderance of proof.

The law presumes the continuance of life for seven years after a person was last heard of, but where a person is shown to have been absent from his home and family for seven years, unheard of by those (if any) who would naturally have heard of him had he been alive, he is presumed to be dead, unless the circumstances attending his absence are such as to account for his not being heard of without assuming his death.

In the case of Rosie Wilson (6 P. D., 133) claimant married sailor while he was in the service. He was discharged and lived with her nine months, during which time he refused to speak of his past history or his antecedents, except to say he was a native of Sweden. He left suddenly in 1866, taking his best clothing, with the avowed purpose of going back to Sweden, since which time claimant has not heard from him.

It was held:

1. A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, *unless the circumstances of the case are such as to account for his not being heard from without assuming his death.*

2. That the circumstances in this case are such as to account for the sailor not being heard from by claimant without presuming his death, and, therefore, no presumption of death arises.

In the case of Pythia Ann Sullivan (7 P. D., 512), it was held:

Where a husband deserted his wife and from the date of his discharge from the United States service in the late war up to 1879 lived and cohabited with another woman as his wife, his death will not be presumed from the fact that he has been absent for seven years unheard of, but his death must be proved by satisfactory evidence before the alleged widow can occupy a pensionable status.

In the case of Mary A. Warburton (7 P. D., 49), where soldier had embezzled money, quarreled with his wife and left her, and his whereabouts thereafter were never known to her, it was held that these facts were sufficient to account for his absence without being heard of, without assuming his death.

And in the case of Helen L. Pepper (9 P. D., 500) it was held that—

The death of the husband can not be presumed from the fact that he deserted his wife, however long said desertion may continue.

In the case of Malinda L. Crider (7 P. D., 462) it was held that—

Where, in a pension claim, the rule as to presumption of death is invoked, it must be shown that the facts attending the absence establish the death of the party beyond a reasonable doubt and independent of absence for any period of time.

This decision seemed to disregard the common-law rule as to presumption of death, and resulted in the passage of the following act by Congress:

AN ACT regulating proof of death in certain pension cases.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That in considering claims filed under the pension laws the death of an enlisted man or officer shall be considered as sufficiently proved if satisfactory evidence is produced establishing the fact of the continued and unexplained absence of such enlisted man or officer from his home and family for a period of seven years, during which period no intelligence of his existence shall have been received. And any pension granted under this act shall cease upon proof that such officer or enlisted man is still living.

Approved March 13, 1896.

In the case of Marie Sharpe (8 P. D., 175), it was held that this act was a legislative restatement of the rule laid down in *Davie v. Briggs* (97 U. S., 628), which is the common-law rule before mentioned. And in the case of Helen L. Pepper, *supra*, it was held that the act of March 13, 1896, relates only to presumption of death of the enlisted man or officer on account of whose service and death pension is claimed, so it has no application to this case.

Absence of a person, alone, does not raise a presumption of death; but such absence, in connection with surrounding circumstances, such as the failure of relatives and friends to learn of his whereabouts, his character and business relations, and the reputation in his family and

with his friends that he is dead, creates a strong presumption of death, the law requiring less than a certainty, yet requiring a preponderance of proof.

On the other hand, evidence to overcome the presumption of death, that the party supposed to be dead was in a financial condition which might have induced him to abscond, or that he was a speculator or visionary in his business or trade, is all proper evidence to be considered by the jury in establishing the fact. See *Sensendefer v. Pacific, etc., Ins. Co.* (19 Fed. Repr., 68.)

The language of the rule is— ♦

Shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him. * * *

In this case all we know is what the claimant says: That he deserted her and has not been heard of by her since. Under such circumstances it can not be said she "would naturally have heard of him."

The proof should have included the statement of his relatives and friends or associates where he lived when the desertion occurred.

So on the bare statement of the claimant that her first husband deserted her, under the decisions cited, his death can not be presumed.

The presumption of life is received in the absence of any counter-vailing testimony as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof, except when it conflicts with the presumption of innocence, in which case the latter prevails. See *People v. Feilen* (58 Cal., 218).

Although the presumption in favor of the validity of a marriage in fact, and of the innocence of the contracting parties, may conflict with that of the continued life of a former husband or wife not heard from for a period less than seven years prior to the second marriage, yet if neither presumption is aided by proof of facts or circumstances cooperating with it, the presumption of the validity of the second marriage must prevail over the other. (*Johnson v. Johnson*, 114 Ill., 611.)

Thus the presumption of life for a period of less than seven years is rebutted by the presumption of innocence to sustain a second marriage.

In *Gates v. Houston* (3 Tex., 433) four years only had elapsed after the disappearance of the wife before the husband and another woman appeared as husband and wife under circumstances raising the presumption of marriage, and in considering the subject the court held that the ordinary presumption of continuance of human life should not, under the facts in the case, outweigh the presumption in favor of the innocence of their cohabitation.

See also *Dixon v. People* (18 Mich., 84); *Chapman v. Cooper* (5 Rich., S. C., 452); *Hull v. Rawls* (27 Miss., 471).

Claimant filed a paper which she says is the only record in existence of her marriage to the soldier and the births of their children, which shows the marriage of G. M. Harnden to Mrs. M. R. Ryder, February

6, 1861; the birth of four children, on February 6, 1862; July 6, 1865; August 22, 1868, and August 13, 1870.

There is a letter on file in the soldier's claim, addressed to the Bureau, November 16, 1897, in reply to an inquiry, in which he states that his wife's name is Margaret Elmira Harnden; that they were married on February 6, 1860, at Clearfield, Pa., by a justice of the peace, but he had no record thereof, and that they had four children, whose names he gave, which names are the same as given by the claimant.

While the presumption of soldier's death is not warranted from the fact that he deserted claimant and was not thereafter heard of by her, we are warranted by the facts of a second marriage, a continuous cohabitation of the parties to date of soldier's death, a period of thirty-seven or thirty-eight years, during which time they reared a family, and the absence of the first husband, unheard of for forty-eight or fifty years, in holding that the presumption of innocence rebuts the presumption of the continuance of life.

This claimant married the soldier prior to the civil war, so prior to his enlistment and service therein, and during the time he was in the service, prior and subsequent thereto, conducted herself as a wife and bore him a family of children. The legitimacy of these children is involved in this case, and in such cases courts have usually upheld the marriage.

From the evidence in this case it appears that from eleven to twelve years elapsed after the disappearance of claimant's first husband before she married the soldier, and it is believed that her said second marriage, coupled with so many years continued and undisturbed cohabitation and repute in the community where she resided that she was the wife of the soldier, is sufficient to uphold this marriage independent of the presumptions of law referred to. That is, the circumstances in this case raises a presumption of fact—that there was no impediment to claimant's marriage to soldier.

Presumptions of fact are the class from which presumptions of law are drawn. Such a presumption is an inference which a reasonable man would draw from certain facts which have been proved to him. Its basis is in logic, its source, probability; it rests on the observed connection between facts, and it requires no law nor court to give it force. (Note (a) to sec. 48, 1 Green. Ev., 65.)

In this case it is held that as the first husband deserted claimant his absence for seven years unheard of by her does not of itself raise the presumption of his death; but from all the circumstances, claimant's marriage to the soldier in 1860 or 1861, and her continued cohabitation with him as his wife until 1898, when he died, rearing a family of children, and the first husband's absence from 1848, unheard of by her, are circumstances from which the first husband's death may be inferred. In other words, the presumption of innocence and morality under the

circumstances in this case outweighs the presumption of the continuance of life and warrants the conclusion that claimant's marriage to the soldier was legal, and that the children born of said marriage are legitimate.

The action of the Bureau is reversed.

MARRIAGE—SLAVES UNDER LAWS OF NORTH CAROLINA—ACT JUNE 27, 1890.

CAROLINE EBORN (WIDOW).

The evidence in the case shows that claimant had an undivorced husband when she married the soldier, and her marriage to the latter, under the law of the State of North Carolina, was void.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 12, 1902.

Caroline, as widow of Everitt Eborn, formerly private, Company F, Fourteenth United States Colored Volunteer Infantry, filed a claim for pension under the act of June 27, 1890, February 8, 1897, which was rejected September 21, 1899, in the following stated language:

Approved for rejection on the ground that the evidence shows that claimant at no time was the lawful wife of the soldier, she having a legal husband, Harmon Topping, living and undivorced.

This claimant had intervened to complete a claim of the soldier filed under the same act, and her claim thereunder was rejected for the above reason.

November 15, 1899, the claimant filed an appeal to the Department, alleging that the Bureau was in error in its consideration of the evidence in the case and the law applicable thereto.

The evidence in the case shows that some time during the war the claimant, in accordance with slave custom, married one Harmon Topping, with whom she lived until some time in 1867 probably, it being impossible to determine the exact date. It is shown that claimant married the soldier some time in 1868, this latter date also being approximated, after Topping deserted her.

The special examiner asked the claimant if she did not continue to live with Topping after she was emancipated. She answered:

Yes, sir; we went to Newbern and then to Goldsboro, N. C.; we were away about twelve months—probably not so long. Yes, sir; I lived with Harmon during that time as his wife. While we were at Goldsboro Harmon told me that we would have to get a certificate to permit us to live together. I went with him to some office where they asked me some questions, but I do not remember what they were. I guess he got the certificate, but I didn't see it. Yes; we continued to live together. I don't know what office it was. It wasn't the court. It may have been the office of a justice of the peace, but I don't know. He sent me back here and afterwards came back himself and stayed a few days, and then went off and never returned.

In this statement claimant is corroborated by other credible evidence. One witness testified that Harmon Topping was seen in the neighborhood in 1876.

The claimant lived with the soldier until about 1888, or possibly later, when he left her, and in 1890 he married another woman, who is also a claimant for pension as his widow. The cases have been consolidated, and the last woman's claim was also rejected, but as she has not filed an appeal her claim need not be considered.

Under the provisions of the act of August 7, 1882, marriages such as are involved in this case (under act of June 27, 1890) shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of the marriage.

The evidence in this case shows that the claimant married, in accordance with slave custom, Harmon Topping while both were slaves, some time in 1862 or 1863, and lived with him until 1867 as his wife. He left her, and in 1868 she married the soldier.

The question to be determined here is whether the marriage to Topping was a valid marriage in accordance with the law of the State of North Carolina.

Section 1842 of the Code of North Carolina, adopted in 1872, provides as follows:

Persons, both or one of whom were formerly slaves, who have complied with the provisions of section 5, chapter 40, of the act of the general assembly ratified March 10, 1866, shall be deemed to have been lawfully married.

The act of March 10, 1866, above referred to, contains the following:

That in all cases where men and women, both or one of whom were lately slaves and are now emancipated, now cohabiting together in the relation of husband and wife, the parties shall have been deemed to have been lawfully married as man and wife at the time of the commencement of such cohabitation, although they may not have been married in due form of law.

It is also by said act made the duty of the persons whose cohabitation has been ratified into a state of marriage to go before the clerk of the court of pleas and quarter sessions at his office, or before some justice of the peace, and to acknowledge the fact of such cohabitation and the time of its commencement, and a failure to perform this duty is made an indictable misdemeanor.

The evidence in this case shows, or tends to show, that the date of the commencement of the cohabitation of Harmon Topping and the claimant was certified to, probably, before a justice of the peace in accordance with the provisions of the statute; but whether this be so or not, under the law as construed by the supreme court of North Carolina the failure to certify as provided does not invalidate the marriage.

In the case of *The State v. Adams* (65 N. C., 537) the supreme court said:

But the failure to perform this duty (of certification, as provided by the act of March 10, 1866) can not avoid the marriage thus ratified by the act of 1866.

In *Long v. Barnes et al.* (87 N. C., 329) it was said:

The living together of a man and woman (formerly slaves) as husband and wife after the passage of the act of 1866, validating marriages between such persons, is conclusive evidence of the parties' consent to the contract.

In *State v. Melton* (120 N. C., 591) the court held as follows:

Persons married in North Carolina while slaves who continued to cohabit after the abolition of slavery were ipso facto legally married (act 1866, ch. 40), and no acknowledgment before an officer was essential. The marriage was complete before the prescribed acknowledgment made before the clerk, even if such acknowledgment were not made at all.

In *State v. Whitford* (86 N. C., 636) the supreme court said:

The marriage act of 1866 (ch. 40) validates a marriage celebrated between a man and woman at the time they were slaves, and makes the living together as man and wife after emancipation and up to the date of the ratification of the act evidence of the parties' consent; nor can such marriage be avoided by a failure to have an acknowledgment of the same entered of record.

It is thus seen that it is entirely immaterial whether there was a certificate of cohabitation made in this case when the validity of the marriage is under consideration. Under the laws of North Carolina the marriage of this claimant with Harmon Topping was a lawful marriage and devolved on both parties the duties and responsibilities of marriage. They were not at liberty to dissolve said marriage except that it be done in conformity to law. Topping's desertion of claimant did not of itself dissolve the marriage relations between them. Therefore her marriage to the soldier in this case was void on the ground that she had an undivorced husband living, and who, so far as the record shows, is still living.

The action of the Bureau from which appeal was taken is affirmed and the papers are returned herewith.

REIMBURSEMENT—ACT OF MARCH 2, 1895—PRACTICE.

CHARLES STAPLES (ALICE HAYNES, COMPLETING).

The applicant, Alice Haynes, who has been allowed reimbursement for nursing and attendance upon the above-named widow, is not entitled to complete the pending claim of the soldier for the purpose of securing further reimbursement. Title in the accrued invalid pension, if any, rested solely in the widow, and never having been allowed it can not be said to exist, and applicant can not assert any legal right in it.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
April 16, 1902.

An appeal has been entered November 26, 1901, on behalf of Alice Haynes, from the action of the Bureau of November 7, 1901, in refusing to allow pension under the act of June 27, 1890, in favor of Charles

Staples, late of Company I, One hundred and thirty-third Illinois Volunteer Infantry (for which he had made application previous to the date of his death), and make the same payable as accrued pension to his widow, Lucinda A. Staples (also dead), so that said Alice Haynes may recover the amount of said pension as reimbursement for the expenses of the last sickness and burial of said widow.

From a review of the record it appears that the soldier had made several claims under the act of June 27, 1890, all of which were rejected. He died April 24, 1898, but just previous to his death he was medically examined with a view to reopening his last claim. It is not found that a direct application to complete said claim was made by his widow after his death. But she did file, July 21, 1899, a claim in her own right, under the same act, and this was allowed December 20, 1900. However, before the certificate reached the pension agent, or, at least, before payment could be made thereon, she also died, the date of her death being December 27, 1900.

Through her attorneys, Alice Haynes made application to the Auditor of the Treasury for the Interior Department for allowance to her of reimbursement of the expenses of the last sickness and burial of the pensioner. This application was favorably acted upon, although, as it appears, the amount allowed by the Auditor was far short of that claimed. According to the allegations, and these were sustained by the evidence, said Lucinda A. Staples had been a sufferer, from soon after the soldier's death, with diseases of the heart, liver, and kidneys and dementia, and had required the constant nursing and attendance of said Alice Haynes. The claim, therefore, was for services at \$1 a day for 969 days. As it was shown that the pensioner's death was the immediate result of pneumonia of three days' duration, the Auditor allowed for this time only at \$2 a day, or \$6 in all, and \$25 for burial expenses. Upon appeal being made to the Comptroller of the Treasury the Auditor's finding was overruled, and it was decided that the petitioner should receive the full amount of the balance of pension due said Lucinda A. Staples, or \$137.37 in all, less \$1 of assets left by her.

The amount thus received by Alice Haynes was still much less than she claimed, and it was sought, by filing evidence to complete the soldier's invalid claim, to secure another fund upon which she might draw. Instead of complying with her wish, however, and adjudicating this invalid claim, the Bureau merely declared that the widow is dead, and it does not appear that the party, Alice Haynes, who nursed the widow during her last illness, would be entitled to complete the soldier's claim for reimbursement purposes. The appeal contends that the widow was as much entitled to the accrued invalid pension as to her own pension, and therefore, the one like the other, is subject to the claim for reimbursement of the expenses of said widow's last sickness and burial.

As far as the title to reimbursement in said Alice Haynes is concerned, it need only be remarked that this is a matter with which this Department has nothing to do—that it is wholly within the jurisdiction of the Auditor and Comptroller of the Treasury—although it would seem that the question has been finally disposed of by the decision of the Comptroller, a copy of which is on file in this case. In that decision, after discussing the subject fully, it is stated that “the claim should be allowed to the extent of the balance of the accrued pension, viz, \$112.87, in addition to the amount allowed by the Auditor, less assets, \$1, and I therefore find and certify a balance due claimant of \$111.87.” This seems to settle the question of what the applicant was entitled to. At least there is no intimation that she might receive more from any other source.

As far as the questions raised pertain to this Department, namely, the right of said Alice Haynes to complete the invalid claim, and the propriety of adjudicating the same in her interest, it is sufficient to state that the Bureau was entirely correct in the position taken and in denying any legal title in the applicant to assume the place of the widow. As already shown, the latter never applied to complete the soldier's claim, and pension has never been granted on his behalf, so that it can not be said that there is any accrued invalid pension. But if there were, the widow was the only person who could receive it. The act of March 2, 1895, is explicit on this subject. It states:

That from and after the 28th day of September, 1892, the accrued pension to the date of the death of any pensioner, or of any person entitled to a pension having an application therefor pending, and whether a certificate therefor shall issue prior or subsequent to the death of such person, shall, in case of a person pensioned, or applying for a pension, on account of his disabilities or service, be paid, first, to his widow.

It will thus be seen that when a widow survives a soldier, title to the accrued pension, if there be any, rests alone in her and it can not be transferred to anyone else. As this widow did not assert her title to the invalid pension of the soldier, or seek to complete his claim, there is really no accrued pension, and the claim must remain unadjudicated because there is no one who has a right under the law to prosecute it to completion. While it may be true, as asserted in the appeal, that the widow had title to any accrued pension due the soldier, yet, as shown, that title was never asserted and it died with her. But even if she had made claim for said accrued pension and it had been allowed, as was her own pension, but she had died before receiving it—before it actually came into her possession—it could not be considered a part of the assets of her estate and could not be paid to any one else on her behalf.

It is not essential to discuss the title of this appellant in the accrued invalid pension, if there were any, as she did not nurse the soldier or bear any expense on his account. The act already mentioned further

provides that no payment of accrued pension shall be made or allowed except so much as may be necessary to reimburse for the expenses of the last sickness and burial of the particular person to whom the pension belonged. And not being entitled on this account, the applicant can not take title by reason of having nursed the widow and secure through indirection what the widow never claimed and what the law does not provide for. The action in this matter was proper and is affirmed.

MARRIAGE IN KENTUCKY—IMPEDIMENT—PRESUMPTION OF DEATH.

AMY COLLINS.

The claimant's former husband appearing to have been absent and unheard of for five years preceding her marriage to the soldier, with whom she lived for thirty-six years thereafter, such remarriage was valid under the laws of the State of Kentucky, where contracted, and she is the soldier's lawful widow.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
April 17, 1902.*

This appellant, Amy Collins, on July 5, 1892, filed a claim, No. 554590, for pension under the act of June 27, 1890, as widow of William F. Collins, who was a member of Company K, Forty-ninth Kentucky Infantry, from July 24, 1863, to December 26, 1864, and who died June 24, 1892.

Said claim was rejected in November, 1895, on the ground that "the claimant is not the legal widow of soldier, she having an undivorced husband, who, at the time she married soldier, was living, so far as can be ascertained."

Reopening of claim was refused in January, 1899; and on October 28, 1899, she appealed, contending that her remarriage was valid because, as legal counsel advised her at the time, her former husband had then been absent and unheard of for over five years, and that her first marriage itself was of doubtful validity, because of the officiating party's alleged lack of authority.

For the purpose of this case, appellant's first marriage may be taken to have been valid. She states she was first married to one Thomas Begley in Tennessee, who, about 1847 or 1848, killed a man in Knox County, Ky., their home, and while under indictment and bond "skipped out" some time after, and has never been heard of since. In February, 1856, she married the soldier, as shown by record evidence, in said Knox County, without having secured any divorce from said Begley, an attorney. A. Woodson, at one time, she thinks, governor of Missouri, having told her said Begley's crime divorced them and that a formal divorce was unnecessary. She lived with the soldier continuously from their marriage to his death, thirty-six years later.

The testimony in the case is extremely meager, and some doubt was at one time, apparently, cast upon the claim by the fact that the declaration states the claimant had never been married prior to her marriage to the soldier. On special examination, however, she testified readily to the fact of her first marriage, and laid the misstatement in her declaration entirely to her attorney, who as emphatically denied responsibility, but against whom the circumstances appeared to bear more strongly, and he appears to have escaped prosecution only because of the time elapsed. Claimant is rated as of good reputation.

The time when said Begley absconded is not definitely shown. Claimant states merely that it was some time after his crime. One or two witnesses have some general knowledge, mainly hearsay, to the same effect. The special examiner states, evidently from the court records, that the case against said Begley was, after various legal proceedings, transferred in 1851 to Perry County for trial, the accused giving bond to appear at the next term, but skipping out before then, and "left the country and has never been seen or heard of since," he adds.

The statutes of Kentucky in force at the time of appellant's marriage to this soldier (Revised Statutes, 1 Stanton, 1860 edition, laws in force from July 1, 1852, p. 380) provided (sec. 9, chap. 28, Art. IV) in declaring a penalty for bigamy that—

Persons whose husbands or wives shall have absented themselves and continually remained beyond the seas or in any State of the United States, not having been heard of for the period of five years preceding the last marriage, the one not knowing the other to be alive * * * are not embraced in this section.

And the supreme court of that State in the case of *Strode v. Strode* (3 Bush, 227), a civil action, held that, under the above-quoted provision of the criminal statutes, a husband whose wife, or a wife whose husband, had thus absconded and was unheard of for five years was "under no disability" and was "lawfully competent to enter into a marriage contract," and remarriage under such circumstances was held to be valid.

Clearly, therefore, this appellant's marriage to the soldier in 1856 was a valid marriage under the laws of Kentucky, if her first husband had then been absent, "continually remained beyond the seas or in any State of the United States," and unheard of for five years.

The evidence as to these conditional facts is, as stated, very meager, but it appears from the special examiner's statement to be well understood and believed in the community that said Begley "left the country" in 1851, and has been, in fact, entirely unheard of since then, a period of nearly fifty years. It is hardly possible to obtain more than this, as it can not well be shown by positive or even any further negative testimony that said Begley was beyond the sea or was in any of the many other States of the Union. The law does not require of

parties impossibilities or strict technicalities when the validity of a de facto marriage which has subsisted and been recognized for very many years is in question. The law favors marriage, and in order to sustain such an one as is shown in this case will presume liberally in favor of it. For this reason it is believed the court would not require strict proof of a full period of five years, even of absence of a former consort, the period in this case being a bare five years, according to the special examiner's statement. Death or divorce within a much less period is often presumed in order to sustain a second marriage, and as any remarriage is invalid only if a former consort is, in fact, living and undivorced, neither of which invalidating conditions is shown herein, or any probability whatever of either, it is believed this appellant's marriage to the soldier is satisfactorily shown to have been valid, and she is therefore his widow.

The action appealed from is reversed, and you will readjudicate the claim accordingly.

RATE-INCREASE-DEAFNESS-PRACTICE.

GEORGE GEARY.

1. Ratings for minor disabilities can not be added together in order to make a grade rating.
2. Claimant being pensioned at \$22 per month for severe deafness of both ears, the degree of deafness existing at the last medical examination, is not entitled to have said rate increased until a claim for increase shall have been filed and a medical examination had showing an increased degree of disability to exist.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
April 17, 1902.*

George Geary, formerly private Company I, Eighty-first Pennsylvania Volunteer Infantry, who is now drawing \$22 per month under the general law for disability due to gunshot wound of left arm and severe deafness of both ears, filed a claim for rerating, February 25, 1899, making the following allegations:

That his rating should be that of total deafness of left ear, and severe deafness of the other, entitling him for deafness the rate of \$25 per month, and his gunshot wound of left arm \$6 per month, making his total rating at or equivalent to the loss of a hand or foot, or total disability of the same, to wit, at the rate of \$30 per month, and asks that he be allowed a medical examination before the board of surgeons at Tunkhannock, Pa., to determine his right to the same.

This claim was rejected August 7, 1899, on the ground that there was nothing upon which to base a rerating from a medical standpoint.

From this action the claimant filed an appeal to the Department, August 17, 1899, making the following allegations as a basis therefor:

The claimant appeals for a reconsideration of his said claim for the following reasons, to wit: That it was arbitrary and unjust to reject his claim for increase with-

out allowing him, the claimant, a medical examination to determine his right to the same; that his deafness is now so severe that it amounts to nearly total deafness, entitling him to the rating of \$22 per month at least, and his gunshot wound of left arm entitles him to at least \$6 per month, making a total far in excess of his present rating of \$22. He therefore asks the honorable Secretary of the Interior to allow his claim for increase of pension to be reinstated and the honorable Commissioner of Pensions be instructed to issue and order for his medical examination before the board of surgeons, No. 2, Scranton, Pa., at 401 Wyoming avenue, to determine his right to the rating asked for.

In the first place, it is to be noted that the claim in issue was simply for rerating. No claim was filed for increase. The bureau considered only the question whether the rating granted claimant in 1899, to date from August 27, 1888, was correct.

The record discloses that claimant was granted \$14 per month on March 2, 1887, to date from November 30, 1885, for gunshot wound of left arm and severe deafness of both ears.

On August 27, 1888, the following act of Congress was passed:

That from and after the passage of this act, all persons on the pension rolls of the United States, or who may hereafter be thereon, drawing pension on account of loss of hearing, shall be entitled to receive, in lieu of the amount now paid in case of such disability, the sum of \$30, in cases of total deafness, and such proportion thereof in cases of partial deafness as the Secretary of the Interior may deem equitable; the amount paid to be determined by the degree of disability existing in each case.

A table of ratings was provided under the above law giving \$22 per month for severe deafness of both ears. The next higher rate is for total deafness in one ear and severe deafness of the other, warranting a \$25 rating.

The medical board in 1886 recommended the "specific" rating (then \$12 per month) for "severe deafness of both ears." Without examination, claimant was raised to \$22 per month for "severe deafness of both ears," just the rate provided by law.

May 17, 1889, a claim for increase was filed which was rejected October 11, 1890, on the ground of "no increase shown." The medical certificate made under said claim is as follows, being dated July 9, 1890.

Pulse rate, 100; respiration, 20; temperature, 98½; height, 5 feet 8 inches; weight, 165 pounds; age, 48 years. The claimant is well nourished; the skin is dry and inelastic; the sclerotics are clear; the tongue is coated and moist. The lungs are normal. The heart is normal in size, sounds and rhythm, with action hurried. The abdominal viscera are normal. Missile struck back of left arm 3½ inches above the olecranon process and passed directly backwards and inwards behind the bone and emerged 3½ inches from the point of entrance in a transverse line; the scars of entrance and exit are the size of a 25-cent piece; slightly depressed and dragging; not adherent nor tender. We consider his disability from gunshot wound of left arm equal to ⅙. The left tympanic membrane is thickened and lusterless; the right tympanic membrane is sunken and the light spot displaced. Hearing, right ear, ⅔. The rating is specific.

It will be seen from this that the rejection of the claim for increase was proper.

The applicant insists that he is now entitled to a higher rating. That may be, but the question can only be decided after a claim for increase is filed. He is also laboring under the impression that whatever disability results from the gunshot wound of the arm should be added to the rating provided by law for the degree of deafness he suffers. In this he is in error.

A grade rate fixed and specified in law is not, nor can it be, made by adding together the ratings of minor disabilities; nor is there an intermediate separate rate allowable between the several grade ratings. (Francis M. Williams, 3 P. D., 401.)

See also Alexander Martin (4 P. D., 378).

In other words, this claimant is entitled, under the law mentioned, to \$22 per month for a certain degree of deafness. The next higher rate is the grade rate of \$24 per month provided for disability equivalent to the loss of a hand or foot for the purpose of manual labor. The evidence in this case does not warrant the conclusion that claimant was entitled to the (\$24) grade rate when he filed his claim in 1889. This being so, the action of the bureau was without error and should be, and is hereby, affirmed.

MARRIAGE—EVIDENCE—BURDEN OF PROOF.

HENRIETTA KIRCHNER (WIDOW).

Appellant was married to the soldier in legal form in 1882, and lived with him in the relation of husband and wife from the date of such marriage to the date of his death in 1896, leaving three children the result of said union. Appellant was never married prior to her marriage to soldier, and no evidence appears in the case tending to show that soldier was ever previously married, but all the evidence in the case shows that he was known only as a single man or bachelor. It is held that the marriage thus shown was subject to attack only on clear and satisfactory evidence of a want of capacity of the husband, which in this case has not been shown, and claimant's marriage to soldier is shown to have been legal, and she is his widow.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
April 17, 1902.*

Henrietta Kirchner, as widow of George Kirchner, formerly private, Company E, First New York Volunteer Cavalry, filed a claim for pension under the act of June 27, 1890, March 16, 1896, which was rejected August 1, 1899, in the following stated language:

Approved for rejection on the ground of claimant's inability to prove the legality of her marriage to the soldier, by proving that no bar to such marriage existed. It can not be shown, aided by special examination, that soldier did not have a wife living when he married claimant.

November 15, 1899, the claimant filed an appeal to the Department alleging that the Bureau was in error in its consideration of the evidence in the case and the law applicable thereto.

In view of the facts, as shown by the evidence in this case, the above ground of rejection is utterly untenable, and presents a most peculiar construction of law, not authorized from any point of observation.

There was not in the case when it was sent to the field for special examination, and there was not in the case when the special examiner's reports were returned, even a scintilla of evidence that the soldier had been married prior to his marriage to claimant. Indeed, all the evidence in the case shows that those who knew him prior to his marriage knew him as a "single man" or a "bachelor."

Mr. Bishop, in the work on Marriage and Divorce, paragraph 956, uses the following language:

Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the forms of proofs, the law raises a strong presumption of its legality, not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain against the constant pressure of this presumption the truth of law and fact that it is illegal and void.

The Department has had many cases involving the issue of marriage and the presumption of its legality when shown. See cases of Jennette Burton (9 P. D., 31); Louise C. Germain (11 P. D., 66); Mary Coburn (11 P. D., 43); Minerva Brown (11 P. D., 266); Esther A. Palmer (11 P. D., 520).

It is the law, nowhere denied, that when a person proves a marriage in accordance with legal forms, that in the absence of facts and circumstances pointing to its invalidity, it is protected by the presumption that it is legal and a valid contract in all respects.

The claimant in this case has proved that she was married to the soldier in legal form, and lived with him from the date of such marriage in 1882 until his death in 1896. Three children were born as a result of the union.

When she proved her marriage, and the death of her husband, he being a pensioner, and that she had never been divorced from him, and asserted that he had never been married prior to his marriage to her, and proved that her prior marriage had been dissolved by the death of her husband, she made out a prima facie case. The marriage thus shown was subject to attack only on clear and satisfactory evidence of a want of capacity of the husband.

In a case in point with the one under consideration, America Hooker (8 P. D., 210), the Department held as follows:

Claimant being unable to prove whether soldier had been previously married, and there being no evidence that such was a fact, but all the evidence rather showing that there was no such prior marriage, the burden of securing the necessary evidence is upon the Government. * * *

See also cases of Carrie Peterson (11 P. D., 139) and Mary C. Buckley (8 P. D., 195).

This claimant has been called upon to prove that her husband had never been married prior to his marriage to her, and because she could

not do so, she was denied a pension, while at the same time the evidence in the case clearly indicates that such prior marriage had never been entered into by him.

It is unnecessary to quote from the evidence for the reason that no one anywhere has even hinted, so far as the record shows, that the soldier had ever been married prior to his marriage to this claimant.

It is clear that the rejection of the claim on the ground stated was erroneous, and the action from which appeal was taken is reversed and the papers are returned for an adjudication in conformity to law.

ORIGIN OF DISABILITY—PRIOR SOUNDNESS—LINE OF DUTY.

CHARLES W. HICKERSON.

Appellant was discharged on account of disability due to disease of eyes upon the recommendation of a board of survey, who reported that while working as a fireman in an electric power house in Washington over two years prior to his enlistment he was (as he says) fire-blinded, so that he could not work for two months, which condition of his eyes became aggravated after his enlistment and detail to the boiler room of the U. S. S. *St. Paul*.

Held: That disease of eyes did not originate in the service and line of duty.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions.
April 19, 1902.

Charles W. Hickerson, formerly a second-class fireman, United States Navy, filed his declaration under the general law on September 6, 1898, claim being rejected on April 14, 1899, on the ground "that alleged disease of eyes existed prior to enlistment, as shown by reports from the Navy Department." An appeal was filed on October 14, 1899.

This claimant enlisted on March 28, 1898, and was discharged on September 1, 1898. The records show that he was examined by a board of survey on July 25, 1898, ordered by the commandant of the United States navy-yard at Washington, D. C., and said board reported him as unfit for duty by reason of "inflammation of lachrymal gland and conjunctivitis of right eye." The duration of the disability was reported as uncertain, but it was advised that he be retained at naval hospital for treatment. The board stated as to origin:

The condition from which the patient suffers was primarily caused by exposure to intense heat while working as a fireman in an electric power house in Washington, D. C., three years ago, previous to enlistment. The condition of his eyes has been aggravated by exposure incident to duty as second-class fireman since enlistment. The condition originated prior to enlistment and therefore not in line of duty.

A second survey was held on August 6, 1898, and the same condition was found as previously reported, it being recommended that he be discharged from the service. The board further stated:

While working as a fireman in an electric power house, in Washington, D. C., three years ago, was "fire-blinded," as he says. He could not work for two months

following this trouble on account of the injury to his eyes. This condition became aggravated after his enlistment and detail to the boiler room on the U. S. S. *St. Paul*. The disease was, therefore, not caused primarily in the line of duty.

As the record now stands it is apparent that this sailor was afflicted prior to his enlistment with some trouble with his eyes, said disability being of a serious nature. While it is true that the disease, or rather disability, became aggravated in line of duty, yet it is plainly apparent that, so far as the evidence shows, the service was not responsible for the disability. It has been generally held by this Department, where one has been disabled by injury or disease prior to enlistment, but has made good recovery therefrom, and nothing further than a possible latent predisposition to the same disability existed at enlistment, that should he be disabled in line of duty thereafter by a similar or kindred disability, such facts might not debar him from a pensionable status. The within case, however, lacks the essential point just mentioned, for there is no showing whatever that the disability incurred in the electric power house had ever practically passed away.

The appeal contends that the record is in error and that claimant was never injured as stated in the report of the survey board, it being quite possible the claimant's record has been confused with that of another man. The Department can take no notice of such a contention only so far as to state that if such contention is made in good faith and the facts susceptible of proof, it should be brought before the proper department with a view to having the record corrected.

Inasmuch as the disability for which pension is claimed is not shown to have originated in line of duty the rejection of the claim is sustained. Action affirmed.

AID AND ATTENDANCE—RATE.

LABAN W. MCINTURFF.

The former decision in this case (12 P. D., 77) holding that "The aid and attendance that appellant requires in putting on a coat or shirt, or in being taken home occasionally when exhausted, is not such as was contemplated by the acts of July 18, 1874, June 16, 1880, March 4, 1890, or July 14, 1892, providing rates of pension in excess of \$30 per month," is adhered to on motion to reconsider.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
April 19, 1902.*

Laban W. McInturff, formerly captain of Company B, Third North Carolina Mounted Infantry, while receiving a pension of \$30 per month, second grade, on account of hemorrhoids, fistula-in-ano, rheumatism, disease of heart, and disease of liver, dyspepsia, and incomplete inguinal hernia, filed, May 18, 1897, a claim for increase, which

was rejected June 13, 1898. From this action he appealed, July 25, 1898, and the action was affirmed by the Department in a decision rendered January 29, 1899. He filed another claim for increase May 31, 1900. This claim was rejected by the Bureau March 11, 1901. He appealed from this action April 1, 1901, insisting that the evidence established his title to the intermediate rate of \$50 per month. The Department, upon considering this latter appeal, was not satisfied with the evidence and deemed it advisable to refer the case for special examination, to ascertain whether, as a matter of fact, the pensioner had the aid and attendance of another person, and whether the same was actually necessary. The special examination was held and the claim was again rejected. A new appeal was filed from this action October 9, 1901.

The Department again considered the case, and in a decision rendered November 27, 1901 (12 P. D., 77), affirmed the action of the Bureau, whereupon the pensioner filed, February 27, 1902, a motion for a reconsideration of said decision.

This motion is based upon the statement that he has periods of helplessness of months in duration, and the time thus covered is greater than the periods when he is in his best health. The evidence in the case does not sustain this contention; on the contrary the evidence, and the pensioner's own admissions, as quoted in the decision rendered, clearly shows his longest period of sickness was not over ten weeks, and in the intervals of these attacks of illness he was able to go to his office and attend to business, and it was in these intervals that he was given aid in putting on and taking off his coat and shirts, and being taken home when he became exhausted.

The Department stated in the opinion of November 27, 1901, that—

The mere matter of assistance in putting on a coat or shirt is not believed to be such condition as was contemplated by the statute in providing the higher rate of pension. As for the help which pensioner requires and received by reason of his going away from home and at times becoming exhausted so that he has to be conveyed home, it may be stated this is hardly a situation for which the law intended to provide.

The Department can see no reason for modifying the conclusion heretofore reached in this case, hence the motion for reconsideration is accordingly overruled, and the former departmental decision of November 27, 1901, is adhered to.

MARRIAGE AND DIVORCE IN PENNSYLVANIA.

REBECCA C. HOWELL (ALLEGED WIDOW).

At the time appellant married the soldier in 1868, in the State of Pennsylvania, he had an undivorced wife living, who died in 1888. She lived with the soldier in the relation of husband and wife from date of marriage to date of his death, July 16, 1890.

Held: That under the decision of the Pennsylvania courts, their continued cohabitation after the removal of the impediment to their legal marriage, without evidence of a new contract, is not sufficient to raise the presumption of a marriage after the removal of such impediment.

See cases of *Sarah C. Hayden* (8 P. D., 364); *Hunt v. Cleveland* (6 Pa. C. C., 592), and *Hantz v. Sealey* (6 Binn., 405).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 21, 1902.

Rebecca C. Howell, as widow of Theophilus Howell, formerly private, Company I, One hundred and thirty-third Pennsylvania Volunteer Infantry, filed a claim for pension under the act of June 27, 1890, July 24, 1900, which was rejected May 25, 1901, in the following stated language:

Claimant is not the soldier's legal widow, as she admits that at the time she married him he had another wife, Mary Ann (Acley), from whom he was never divorced.

November 30, 1901, the claimant filed an appeal to the Department from the above action, alleging that the Bureau was in error in its consideration of the evidence in the case and the legal conclusions thereunder. It is contended that under the law of the State of Pennsylvania the claimant would be recognized as the widow of the soldier and she should, therefore, be considered his widow for pensionable purposes.

A marriage such as the one in issue here shall be proven in a pension case to be a lawful marriage according to the law of the place where the parties resided at the time of the marriage. (Act of August 7, 1882.)

The claimant alleged she was married to the soldier August 1, 1868, in the State of Pennsylvania, by ceremony. The evidence regarding this ceremony seems satisfactory, and the claimant and soldier lived together as man and wife continuously for a period of thirty-two years, or until July 16, 1900, when the soldier died.

The claimant was capacitated to marry the soldier, but it appears that when he married claimant he had an undivorced wife living, and this woman lived until 1888, when she died. It is clear that the marriage between claimant and the soldier in 1868 was void on the ground of want of capacity to marry on the part of the latter. The issue is whether a marriage can be presumed from cohabitation and repute covering the twelve years between the date of the first wife's death and that of the soldier. The answer to that question must be found in the decisions of the courts of Pennsylvania in like cases, wherein the law of marriage in that State is laid down.

In the case of *Sarah C. Hayden* (8 P. D., 364) the Department held:

In Pennsylvania marriage is a civil contract to the validity of which the consent of the parties able to contract is all that is required; but when two persons marry while one of them has a husband or wife living and not divorced such marriage is void,

and their continued cohabitation after the removal of the impediment to their legal marriage without evidence of a new contract is not sufficient to raise the presumption of a marriage after the removal of such impediment.

The cases of *Hautz v. Sealey* (6 Binn., 405) and *Hunt's appeal* (86 Pa. Stat., 294) were cited in course of the opinion.

The case of *Hunt v. Cleveland* (6 Pa. C. C., 592) was decided in 1886, and the opinion, coming before the court on an agreement that the marriage of the parties was the only question in issue, almost entire, is as follows:

Delilah Cleveland was married to V. P. Cleveland in May, 1861. The parties have continued to live together as husband and wife until the present time (1886). At the time of this marriage V. P. Cleveland had a wife living, who married again in 1856 or 1857. She died in 1863 or 1864. There is no evidence that Delilah Cleveland knew of this former marriage. Cohabitation and repute are not marriage, but only circumstances from which a marriage may be presumed. The presumption of marriage from such facts may always be rebutted, and wholly disappear in the face of proof that no marriage in fact had taken place. (*Hunt's appeal*, 86 Pa. Stat., 294.) Although the parties continued to cohabit after the death of the lawful wife of V. P. Cleveland, there was no actual marriage, as shown by the following question put to V. P. Cleveland and his answer: "Have you at any time since the death of Miss Hinchley [his former wife] agreed with Delilah Cleveland to be her husband and she your wife?" Answer. "I agreed to be her husband and she my wife when we were married, and what was the use of it since? I never made any such agreement with Delilah Cleveland since we were married in 1861."

This brings the case within the principle decided in *Hunt's appeal*, that a relation between a man and woman which was illicit at the commencement is presumed to continue so until proof of change, and a marriage, therefore, will not be presumed from cohabitation and reputation, when the relation between the parties was of illicit origin, in the absence of proof of a subsequent actual marriage.

See also *In re Culver's estate* (7 Kulp Pa., 219).

The case decided in *Hunt's appeal* (supra) and the case of *Hunt v. Cleveland* (supra) are strikingly in point with the one under consideration. On April 5, 1901, the claimant filed the following affidavit:

That she can not furnish decree or certified copy of the divorce of her husband, Theophilus Howell, from his wife, Mary Ann, from the fact that no decree exists on the records of the court. My belief that they were divorced was founded on the fact that my husband told me so, and I never had reason to dispute it until my attorney had the records searched, and then I knew it could not have been true. My relations to him were not changed after the death of Mary Ann, September 27, 1888, because I always considered myself his lawful wife and had no reason to change our relations.

Under the law of Pennsylvania, as interpreted by the courts of that State, the claimant would not be recognized as the widow of the soldier in that State. That being so under the law she has no title to pension, one of the essentials to title being a proved relationship according to the law of the place where the marriage took place.

The action of the Bureau from which appeal was taken is affirmed.

MARRIAGE IN NEW YORK—DIVORCE—DECREE.

EUGENIA SHERWOOD (WIDOW).

Appellant married the soldier, by ceremony, in the State of New York, February 28, 1866, and they lived together in that State as husband and wife for one year and nine days, when they separated. Some time thereafter soldier left the State of New York for the State of Michigan, accompanied by one Eliza J. White. While in the State of Michigan soldier applied for and obtained a divorce from claimant, May 5, 1870, on the ground of desertion, and on March 4, 1871, married, by a ceremony, said Eliza J. White, in the State of New York, and lived with her as her husband until his death in 1879, two children being born to them during this period.

Held: That under section 2 of the act of August 7, 1882, which provides that marriages "shall be proved in pension cases to be legal marriages, according to the law of the place where the parties resided at the time of the marriage or at the time when the right to pension accrued," soldier's second marriage was void, the courts of New York, where claimant and soldier were married, and where she resided at the time the right to pension accrued, having decided that a decree of divorce in another State proceeding on a constructive service of process by publication, though valid by the law of the forum, is void in the State of New York, and does not change the status of a defendant in the jurisdiction of the State of New York.

See *Atherton v. Atherton* (82 Hun., N. Y., 179); *In re House* (40 N. Y. St., 286); *David v. Davis* (2 Del., 549); *Williams v. Williams* (130 N. Y., 193); *People v. Baker* (76 N. Y., 78); *Vischer v. Vischer* (12 Barb., N. Y., 640), and *Kerr v. Kerr* (41 N. Y., 272).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 21, 1902.

Eugenia Sherwood, as widow of George H. Sherwood, formerly private, Battery I, Third New York Light Artillery, filed a claim for pension under the act of June 27, 1890, April 2, 1897, which was rejected July 5, 1899, in the following stated language:

Approved for rejection on the ground that claimant is not the legal widow of the soldier, he having secured a divorce from her, May 5, 1870.

October 23, 1899, the claimant, by her attorney, filed an appeal to the Department, alleging that the Bureau was in error in its consideration of the evidence in the case and the law applicable thereto.

The facts in the case are substantially as follows:

The claimant married the soldier, by ceremony, in the State of New York, February 28, 1866, and they lived together for one year and nine days, when a separation took place, it not appearing clearly from the evidence which one deserted, although it is clear that when the husband left New York for the State of Michigan he was accompanied by one Eliza J. White. While in the State of Michigan the soldier applied for a divorce, charging desertion upon the part of his wife, and on May 5, 1870, the circuit court of Michigan granted him an

absolute divorce. On March 4, 1871, the soldier married, by ceremony, Eliza J. White, in the State of New York, and lived with her as his wife until his death in 1879. Two children were born during this second marriage. It appears that the soldier came from Michigan to the same town in New York where he had married and lived with his first wife and there resided until his death.

The issue raised by this appeal is as to the binding effect of the Michigan divorce in the State of New York, and this by virtue of the act of Congress of August 7, 1882, which provides as follows:

SEC. 2. That marriages, except such as are mentioned in section forty-seven hundred and five of the Revised Statutes, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued. * * *

In other words, comes now this claimant and asserts that the marriage which she proved between herself and the soldier, under the law of the State of New York, was a valid marriage at his death, and that she is his widow, notwithstanding the decree of divorce granted by the Michigan court. This can only be tested by the law of New York.

There is no statute in New York State which declares that a divorce granted in another State, under certain circumstances, shall be void within that State. The only statute on the subject of divorce is the provision of the code setting out how and under what circumstances a divorce may be granted. (See code of New York, Domestic Relations.) We must, therefore, have resort to the decisions of the courts of New York as to what is the law on the issue here presented.

In the case of *Atherton v. Atherton* (82 Hun., N. Y., 179) a case arose where the wife brought an action against her husband for divorce and alimony. The parties were married in the State of Kentucky in 1888 and lived there until 1891, when, after a quarrel, the wife left the husband and went to New York to live. The husband was divorced in Kentucky on his petition. The New York court said of the divorce granted in Kentucky:

Such an action was commenced and such proceedings were had in virtue of the law of the State of Kentucky, which resulted in a judgment pronounced by the circuit court of Jefferson County, Ky., awarding the defendant a divorce from the plaintiff on the ground of her alleged abandonment. A warning order was issued in that action, and there was an appointment of a representative attorney. Doubtless, according to the proceedings had in that action in the territorial jurisdiction of Kentucky the judgment would be efficient. However, as no process was served on her in the State of Kentucky, and she made no appearance in that suit, and in no way has consented thereto, and did no act which gave the judgment binding force upon her in this State, we think, according to the well settled rule laid down in numerous cases in this State, that the judgment is wholly inoperative in this State, and was not binding upon the plaintiff at the commencement of this action, and that it forms no bar to her right to maintain this action against the defendant who has personally appeared in the action.

In the matter of House (40 St. Rep. N. Y., 286) the court said:

The deceased removed to Ohio, where he obtained a divorce on the ground that she had abandoned him, and afterwards remarried and returned to this State. The process in the divorce action was served by publication, no personal service being made on the wife, who was a resident of this State, and she did not appear in the action, but she admitted service of notice of the taking of testimony in this State and consented that it be taken without notice to her. Held, that the court of Ohio never acquired jurisdiction of the person of the first wife; that its divorce was absolutely void in this State, and that the first wife was entitled to administer on the estate.

In the same case the court said:

Our courts have always maintained that a citizen of this State could not be charged in personam by the adjudication of the courts of another State unless he was personally served with process or voluntarily submitted in some legal manner to their authority.

In the case of *Davis v. Davis* (2 Del. N. Y., 549) it was held:

A decree of divorce in another State, proceeding on a constructive service of process by publication, though valid by the law of the forum, is, by the law of New York, a nullity as to a defendant spouse resident in New York.

In the matter of *Strong* ('86 Hun. N. Y., 390) the New York court said:

A divorce obtained in another State against a citizen of New York, in an action where there was no personal service of process within the former State and no personal appearance in the action by the defendant, is void in the State of New York, and does not change the status of the defendant in the jurisdiction of the State of New York.

(See also *Williams v. Williams*, 130 N. Y., 193.)

In the case of the *People of the State of New York v. Frank M. Baker* (76 N. Y., 78) the court said:

A State may adjudge the status of its own citizens toward nonresidents, and may authorize to that end such judicial proceedings as it sees fit; but the judgment can have no effect within the bounds of another State so as to fix upon a citizen of the latter a status, against his will and without his consent, which is in hostility with the laws of the sovereignty of his allegiance. A court of another State can not adjudge the dissolution of the marital relations of a citizen of this State, domiciled and actually residing here during the pendency of the judicial proceedings in such State, without a voluntary appearance on his part therein, and with no actual notice to him thereof; and this although the marriage was solemnized in another State.

In the case of *Vischer v. Vischer* (12 Barb. N. Y., 640) the court said (syllabus):

A and B, having a domicile in this State, were married here, and afterwards the wife obtained a divorce a mensa et thoro. Subsequently the husband went to Michigan and obtained a divorce a vinculo on a charge of willful desertion, the wife not having appeared, nor having notice except by publication in a newspaper of that State. Held, that the divorce was a nullity; and the husband having married again in this State, a divorce was granted on the petition of the wife for adultery.

In the case of *Kerr v. Kerr* (41 N. Y., 272) the court said:

The Constitution of the United States and the acts of Congress declaring that full faith and credit shall be given in each State to the judicial proceedings of every

other State, and the acts of Congress declaring that the judgments of State courts shall have the same faith and credit in other States as they have in the States where they were rendered, do not prohibit an inquiry by the courts of this State into the jurisdiction of the court of another State, in which the original judgment was rendered, nor an inquiry into the right of that court to exercise authority over the parties or subject-matter, nor an inquiry whether the judgment is founded upon or impeachable for fraud; and such judgment may be inquired into in such respects, although according to the statements in the record itself the court had acquired jurisdiction both of the person and subject-matter.

(See also *McGiffert v. McGiffert*, 31 Barb. N. Y., 69; *Borden v. Fitch*, 15 John. Ch., 141; *Hoffman v. Hoffman*, 46 N. Y., 30; *Kinnier v. Kinnier*, 45 N. Y., 535; *Jackson v. Jackson*, 1 John. Ch., 425.)

In the case under consideration the service upon the defendant (the claimant) was by publication in Michigan, and she made no appearance at the trial, and authorized and made no defense. It is held by the New York courts, as above cited, that such a divorce is wholly null and void in the State of New York.

It further appears that in a suit brought by one of the children of the soldier against the other child and the first and second wife, for a partition of the soldier's estate in 1894, the supreme court of New York found that the marriage to the second wife was void, and awarded the first wife her dower interest in the property involved. It is true that in this latter decision, the marriage being incidentally in issue, the finding could have no force in this inquiry beyond its indication as to what the New York law is upon that subject.

There can be no doubt, however, that under the law of New York, as interpreted by its courts, the claimant is there held to be the widow of the soldier.

The soldier died in June, 1879, and the second wife remarried in November of that year, and as guardian of the children she has also been before the Bureau as an applicant for pension in their behalf. Her claim was rejected, but no appeal from that action has been filed and it need not be separately considered, although said claim is in effect disposed of by this decision in favor of the first wife.

Accordingly, the action of the Bureau is reversed and the papers are returned for an adjudication of the claim in conformity herewith.

MARRIAGE—NEW YORK LAWS—IMPEDIMENT—PRESUMPTION OF DEATH.

ANN GREEN (WIDOW).

The claimant's marriage to the soldier is shown to have been valid under the laws of the State of New York where celebrated; her former husband being reported and generally believed to have died eleven years before, and not heard of since his reported death, twenty-six years ago at this time.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
April 22, 1902.*

This claimant, Ann Green, on October 21, 1899, filed a claim, No. 707190, for pension, under the act of June 27, 1890, as widow of George W. Green, who was a member of Company I, Fifty-first New York Infantry (transferred to Ninety-third Company, Second Battalion, Veteran Reserve Corps), from October 23, 1861, to October 29, 1864, and who died April 1, 1899.

Said claim was rejected first in October, 1901, and finally in March, 1902, on the ground that the death or divorce, prior to her marriage to the soldier, of her first husband, Peter McAvoy, is not shown, and that her marriage to the soldier was, therefore, not valid, and she is not, in law, his widow.

In this appeal, filed March 17, 1902, it is contended that the prior death of said McAvoy is fully established and the consequent validity of the claimant's marriage to the soldier.

This claimant's marriage to the soldier on April 28, 1887, in the State of New York, is shown by record evidence. She admits a prior marriage, in 1861, to said Peter McAvoy, with whom she lived until about 1870, when she says she left him because of his drinking habits, and a few years later she heard of his death while working on a railroad. In the meantime, however, she had remarried one Patrick Nevells, believing her marriage to McAvoy to have been invalid, according to her religion (Roman Catholic), because solemnized only by a justice of the peace and not by any church celebrant. Said Nevells died in 1881.

The only question in this case appears to be as to the death of claimant's first husband. Her marriage to him by a justice of the peace was undoubtedly legal and valid without any ecclesiastical solemnization, whatever her religious views in the matter, and her remarriage to Nevells was, equally without doubt, illegal and invalid, as said McAvoy is admitted to have been then living, as no divorce from him at any time is asserted, and as he had been absent less than five years when she married Nevells.

The only positive testimony as to the death of said Peter McAvoy is an affidavit executed in Brussels, Belgium, before the minister for that country of the United States, by said McAvoy's son, Thomas, who says his father died September 9, 1876, at Long Island City, N. Y. A number of persons who knew said McAvoy also testify that they heard of his death soon after claimant left him, and the general belief of the community appears to be to the same effect. The records of Long Island City fail to show his death. Claimant herself heard of his death, she says, while she was living with Nevells, but is uncertain whether it was reported to have occurred in New York or in Missouri.

She says he was said to have fallen, while drunk, down an embankment of a railroad on which he was employed as a constructionist.

The news of said McAvoy's death appears to have been derived entirely from newspaper accounts. Upon what knowledge the son Thomas testified is not stated by him, and in the final action in March, 1902, his testimony was held to be insufficient to warrant any change of action because he did not state his means of knowledge or give data for verification of his testimony, "which undoubtedly has no better basis," it is stated in the rejection, "than the rumors which the special examination showed to be insubstantial."

There is reliable testimony corroborating claimant as to said McAvoy's drinking habits, and, notwithstanding her remarriage to Nevells while McAvoy was known to be living, she is said to be a woman of good repute in the community.

It is seen that a period of eleven years elapsed between the date of said McAvoy's death, according to his son, and claimant's remarriage to the soldier, and that the former has not been heard of since 1876, at the latest—a period of over twenty-five years.

It is believed that the claimant's marriage to this soldier was valid under the laws of the State of New York, where celebrated. It was entered into apparently in good faith, subsisted for many years, and was not questioned until after the death of the soldier. In such cases, there are strong legal presumptions and considerations of public policy in favor of such a marriage, and but slight evidence of the prior death or a divorce of the former consort is required, or either death or divorce may be presumed. See cases cited in *Jennette Burton* (9 P. D., 31); *Louisa C. Germain* (11 P. D., 66); *Nora O'Brien* (12 P. D., 32).

There appears to be no reason whatever for supposing said Peter McAvoy was alive at the time of such remarriage by appellant, but, on the contrary, his death many years before appears to be a matter of common report and general belief; and the fact that this report and belief may be based mainly or solely upon an alleged newspaper notice of his death does not render incompetent or lessen the weight of the testimony as to the notoriety or generality of this report and belief; matters of general notoriety or public rumor being provable by newspaper accounts thereof (1 *Greenleaf on Ev.*, sec. 101; 2 *Wharton's Law of Ev.*, secs. 253, 254, 672), or such accounts being admissible, possibly, as *res gestæ*, the weight thereof as evidence to be determined by the jury (1 *Greenleaf on Ev.*, sec. 108; *Jewell v. Jewell*, 1 *How.*, 219).

Irrespective, however, of the proof of the fact of McAvoy's death, such fact may well be presumed under the general rule of the common law as to presumption of death, which, as seen from numerous decisions cited in the case of *Nora O'Brien*, *supra*, is fully recognized and

followed in New York; although it might be considered that the fact appellant herself voluntarily left said McAvoy would account for his prolonged absence without being heard of by her. While this fact may be true, the rule is much broader—it specifies an absence without being heard of “by those, if any, who, if he had been alive, would naturally have heard of him,” and the presumption does not obtain if “the circumstances of the case are such as to account for his not being heard of without assuming his death.”

Certainly no reason whatever appears why others, besides appellant, in the community in which said McAvoy had been resident should not hear of him if he were living, and it seems likely, indeed, that if he were living some of these would have heard of him during the long period since he was reported dead; and certainly the circumstances of the case fail to furnish any reasons sufficient to account for his not being heard of during this period if his death be not assumed.

The courts of New York appear, however, to have more usually considered cases of this character under the particular statute of that State which declares that a remarriage during the lifetime of a former consort, but after such consort “shall have absented himself or herself” for five successive years next before such remarriage, without being known by the one remarrying to be living, is “void only from the time its nullity shall be pronounced by a court of competent authority;” and under the section of the code of procedure declaring that an action to annul such a remarriage may be maintained by either party “during the lifetime of the other or by the former husband or wife,” and the “Domestic Relations Law” providing that “actions to annul a void or voidable marriage may be brought only as provided in the code of civil procedure.”

The court of appeals held in the case of *Brower v. Bowers* (1 Abb. Ct. App., 214), an action involving a question of legitimacy, that “there can be no doubt” that such a remarriage would be “valid until declared void upon the application of one of the parties to the marriage or the former husband.”

And the Supreme Court held in the case of *Cropsey v. McKinney* (30 Barb., 47), that such remarriage in that case was valid, for the purposes of that action (one by the assignees in bankruptcy of the second husband against the assignees in bankruptcy of the wife, claiming her property as his by virtue of such remarriage), although the first husband, who, at the time of the remarriage had been absent and unheard of by the wife for five years, was shown in said action to be then living; the court holding also that such a remarriage, if voidable, must be avoided during the lifetime of the parties, and can not be declared void collaterally, as was attempted to be done in that action, and stated further, that if the wife did know at the time of her remarriage that her first husband was then living, “she not only committed

a great crime when she married McKinney, but has added to that crime another great one in these suits. A presumption that she has committed these crimes should not be indulged in on slight grounds."

The circumstances antedating the remarriage in that case were quite similar to those in this one. In that case there was a mutual separation, and nearly two years later, and a month after the wife last saw her husband, there was a newspaper account of a drowned body being found, the description of which corresponded with his, and she believed it to be his, and five years later she remarried. Her story was said to be corroborated, but that there was also "a good deal of testimony" that said first husband had been seen by others, but not by her or known of by her, up to the time of her remarriage; several years after which, however, he was shown, in that action, to be alive. But notwithstanding these adverse facts the court held such remarriage to be valid, so far as that action was concerned, under the statute above mentioned.

This appellant's case does not appear to be materially different, and is, in fact, much stronger, her first husband not being shown to be now alive or to have been alive at the time of her marriage to the soldier, and the party to the second marriage, the soldier, being dead, and, as in that action, this marriage being brought in question only collaterally.

And it has been repeatedly held that a remarriage under the circumstances mentioned in the five year statute is voidable, merely, and not void, and is valid until declared null on proper application to a court of competent jurisdiction, which, according to the code of procedure, must be during the lifetime of the parties thereto.

In the case of *Valleau v. Valleau* (6 Paige, 207), an action for divorce, it was stated such remarriage was "voidable merely," and that subsequent cohabitation with the former consort prior to a judicial annulment of the remarriage would be illegal.

In *Gall v. Gall* (114 N. Y., 109) an action to admeasure dower, the court of appeals say the first marriage is suspended by the remarriage and "is not reinstated by the return of the absentee, * * *. The first marriage ceases to be binding until one of the parties to the second marriage procures a decree pronouncing the second marriage void."

And particularly in the case of *Jones v. Zoller* (29 Hun, 551), the status of such remarriages was fully considered under the several laws relative thereto, and it was held that "the latter part of this section (5) in its words of exception saves from the terms of its inhibition such second marriages as fall within the permissive terms of section 6," said section 5 declaring void all remarriages when a husband or wife is living, "except in the case provided for in the next section," which is the "five-year statute" under consideration; and the court quoted

with approval the statements in *Griffin v. Banks* (24 How., 215), an action involving the same remarriage in issue in *Cropsey v. McKinney*, supra, that such remarriage "has the same force and effect as if when it was solemnized McCollum (the first husband) was not alive," and was as "legal in its origin and continuance as any other marriage."

The court in this case (*Jones v. Zoller*) referred specially to section 36 of the Revised Statutes, stating that under that section an application to annul such second marriage might be brought "in the lifetime of the other" by either of the parties of the first consort, and that nothing in that section or in section 37 or section 9 warrants any other construction of said section 6.

In *White v. Lowe* (1 Redf., 376) the court say, as to section 6:

To prevent the marriage being absolutely void, the Revised Statutes changed this rule (as to remarriage during a consort's life being void) and made the marriage voidable only (Reviser's notes, 3 Rev. Stat., Ind. Ed., 660). It is to be assumed that the legislature in changing the law meant to place such marriages on the same footing as all other voidable marriages. That is the inference from the act. * * * If not declared void it remains good and valid for all purposes.

And in that case (an action for dower) it was contended that as the wife absented herself and remarried, such remarriage was not within this statute; but the court held that the words used in that statute, "shall have absented himself," meant and were intended the same as the words "shall have been absent," used in the prior statute, and that "the fact alone of absence, the one from the other, for the specified time, without knowledge of the other living, will bring the party within the statute."

In *Taylor v. Taylor* (25 Misc., 566) the court say:

If she (the plaintiff, suing for separation) honestly acted under the supposition that Dennis (who had absented himself for five successive years without being known by the plaintiff to be living during that time) was dead, she is protected by the statute, and the marriage is voidable merely—in other words, not void until so pronounced by a court of competent authority.

And in that case the court also held that such remarriage could not be annulled in that action as a counter claim by the second husband.

From these many decisions by the courts of New York it can not be doubted that this appellant's marriage to the soldier was legal and valid, and that it must be so held herein, even were McAvoy in fact now alive, under the act of Congress of August 7, 1882, providing that marriages "shall be proven in pension cases (with one exception) to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued."

The action appealed from is reversed, and you will readjudicate the claim accordingly.

MARRIAGE—EVIDENCE—PRESUMPTION OF DEATH—IMPEDIMENT.

ELIZABETH ADAMS (WIDOW).

The only testimony as to claimant's first marriage and as to that husband's death being her own statement, which shows also that his death was prior to her second marriage, she appearing to be a woman of good reputation, and no further testimony appearing to be procurable, she is held to have satisfactorily established her capacity to remarry.

Her second marriage is shown of record; also a third, to the soldier, three years later, and subsequent to the reported death in England of her second husband, but the only testimony as to the death of her second husband is her own statement, none other appearing to be procurable. She and soldier cohabited as husband and wife until his death nearly thirty years after their marriage, with no further news of her second husband.

Held: Assuming her formal marriage to the soldier was invalid and void, the prior death of her second husband not being satisfactorily established by proof, that the latter's death may be presumed under the general rule as to presumption of death, and that there was a valid common-law marriage subsequent to the seven-year period mentioned in said rule.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
April 24, 1902.*

This appellant, Elizabeth Adams, on December 11, 1896, filed a claim, No. 644746, for pension under the act of June 27, 1890, as widow of Arthur A. Adams, who was a member of Company G, One Hundred and Twenty-first Ohio Infantry (transferred to Company I, Twenty-second Veteran Reserve Corps) from December 7, 1863, to June 23, 1865, and who died October 21, 1896.

Said claim was rejected in April, 1898, on the ground "that the claimant is unable to prove the legality of her marriage to the soldier in 1868, she having been married to Thomas Woolcock June 15, 1865, from whom she was never divorced, and whose death she is unable to prove."

On October 30, 1899, she filed this appeal, contending that the death of her former husband should be presumed, and that rejection was erroneous because she was not given time or opportunity to search for further evidence, or "the benefit of a special examination to fully investigate and show the bottom facts in the case."

There is record evidence herein of appellant's two marriages, mentioned, first as Elizabeth Wright to Thomas Woolcock, June 15, 1865, and next, as Elizabeth "Wilcox" to the soldier, July 31, 1868; both in the State of Ohio, and in the same county, Knox. There is no other evidence as to marriage, either of herself or of soldier, except her own statement contained in a lengthy affidavit filed April 11, 1899, and the reply of the clerk of the court of Richland County, Ohio, that there is no record there of any marriage between appellant and one Eugene Wright.

She states in this affidavit that her maiden name was Nixon; that in 1863 she became acquainted with said Eugene Wright, who claimed to be a Union soldier on "French furlough," and who was visiting his grandparents 2 miles from her home; that he proposed marriage to her, but as her parents opposed it he induced her to elope with him, and they were married in Mansfield, Richland County, Ohio, by ceremony, and lived together for seven months in Beaver, Allen County, Ohio, when he reenlisted, and she heard no more of him until, at the close of the war, his father came to her at her parents' house and told her he was dead and had, on his deathbed, confessed that their marriage was a mock one, and requested his father to look after her; that she was so filled with sorrow over this news as to their marriage that she kept it both from her parents and from her daughter, the issue of such marriage, and now a married woman and her next-door neighbor; that she did not reveal in this claim the invalidity of that marriage until called upon for evidence, but now does so upon the advice of her attorney that all facts and the whole truth must appear herein, and in order to explain the record showing that when remarried in 1865 to said Thomas Wilcox, or Wolcox, as he spelled it, she gave her name as "Wright," in order to keep the secret of the fraudulent character of her marriage to said Wright; that two months after her marriage to Wilcox he deserted her, alleging he must go to England to settle up and return with the proceeds of an estate left him; that shortly after he went to England she received a letter from one Dunbar, claiming to be a cousin of said Wilcox, saying the latter had died, and hearing nothing more of him, in 1868 she married the soldier, with whom she lived until his death, a period of twenty-eight years; that she can not produce said Dunbar's letter, as on her marriage to the soldier they, by mutual agreement, destroyed all their correspondence with others; that the grandparents of said Eugene Wright are dead, and that she has never heard since of Reuben Wright, the father of said Eugene Wright, whose residence was, she thinks, St. Paul, Minn.; and that she has no means of tracing said Wilcox and proving his death. She now resides in California.

Appellant has given in this affidavit, evidently prepared by her attorney with great care, an apparently true and candid statement. She appears to have contracted each marriage in good faith, each remarriage only after apparently authentic information of the death of the former husband, and to have cohabited with the soldier as his wife for a long period of years, without any news of either of her former husbands, or any question being raised until now as to the validity of her marriage to the soldier. There is nothing in the case to show that either of her former husbands has been heard of since his reported death, and nothing to cast any suspicion upon claimant's story as to the reported death of each. On the contrary, as stated,

her statement appears to be candid and truthful, as well as reasonable and consistent. Her concealment as to the alleged fraudulent character of her first marriage was natural under the circumstances, and no good reason appears why she should then, or until the filing of this claim, have made any revelations in the matter, or why any further publicity need now be given it. And, as the only evidence of that marriage is her own statement, which shows also that that husband died prior to her marriages to Wilcox and the soldier, no further consideration need be given it herein; for, if her statement be accepted as to the one fact, it must also as to the other (see *Sarah Buchanan*, 10 P. D., 423); thus, taking it as a whole, showing her capacity to remarry.

Her marriage to Wilcox, therefore, would appear to have been legal and valid, and in order to show a valid marriage to the soldier the death or divorce of Wilcox must be either proved or presumed. His death at any time appears to be not susceptible of direct proof, and the general rule of the common law as to the presumption of death does not attach until a party has been absent for a period of seven years unheard of by those, if any, who would naturally hear of him if living, and unless the circumstances of the case are such as not otherwise to account for such absence than by assuming death.

It was held in the case of *Rice v. Lumley* (10 Ohio St., 596) that—

When a man leaves his home or usual place of residence and goes to parts unknown and is not heard of or known to be living for the period of seven years, the legal presumption arises that he is dead.

And in the case of *Rosenthal v. Mayhugh* (33 Ohio St., 155) the court say:

The facts of this case show a permanent abandonment of the wife and a refusal to support her and his children longer. It was a separation de facto. For more than eight years the state of coverture had in fact ceased, and she was left more helpless than a feme sole. He did all that was in his power to divorce himself from her, and to invest her with power to act for herself. He was absent and unheard of for more than seven years. This raises a presumption that he was dead. * * * This presumption arises as well where the husband has gone to another State of this Union as where he has gone to a foreign country.

From these decisions it is apparent that said Wilcox may be presumed to be dead, but as this presumption does not attach until seven years shall have elapsed since the party was last heard of, he must be presumed to have been alive at the time of appellant's marriage to the soldier, which was probably two years only after said Wilcox's reported death and only three years after her marriage to the latter.

In some States, in order to sustain a remarriage thus entered into in good faith within the period of seven years, the death of a former consort is presumed to have occurred prior to such remarriage, but no decision of the Ohio courts so holding has been found on a careful search of the reports.

Such remarriage in this case, however, may be sustained upon another ground, viz, by presuming a common-law marriage subsequent to the seven-year period mentioned, common-law marriages being valid in the State of Ohio (*Fredricka Kent*, 10 P. D., 211), and presumable even when cohabitation was confessedly illicit at inception, as in the case of *Swartz v. State* (13 Ohio C. C., 62), in which, as stated in the case of *Fredricka Kent*, it appears that Swartz formerly had illicit relations with one Henrietta, but that later on they assumed the relation of man and wife, evidenced only by reputation, cohabitation, and declarations, and such marriage so established was held to have been valid.

If a lawful marriage might thus be presumed, and in a criminal action for bigamy, when the parties had begun their cohabitation meretriciously, how much greater reason exists for presuming a lawful marriage in a case like the present, where the parties began cohabitation in entire good faith, were matrimonially and not meretriciously inclined, continued such bona fide relations for a long period of years, and the validity of which has been entirely unquestioned until after the death of one of them.

The court in that case cited with approval the case of *Yates v. Houston* (3 Tex., 433), wherein the court first allowed the presumption of the death of the first wife to attach, and then, from the continuation thereafter of the cohabitation begun under the prior invalid marriage, presumed a subsequent valid confirmation of such marriage.

In the case of *Fredricka Kent*, *supra*, the Department held, upon the authority of said case of *Swartz v. State*, that a valid common-law marriage to *Fredricka* subsequent to a divorce of the soldier in that case from a former wife was presumable, the formal marriage to *Fredricka* having been prior to such divorce, and likewise in this case is a valid common-law marriage to this soldier presumable subsequent to the period of seven years from the time said *Wilcox* was last heard of, during which period of over twenty years appellant and soldier lived together as husband and wife, intended and believed themselves to be such, and were fully recognized as such by the community.

It is held accordingly that there was a lawful and valid marriage existing between appellant and the soldier at the time of his death, and that she is his lawful widow. Nothing apparently is to be gained by a special examination, and there appear to be no suspicious circumstances in the case. The action appealed from, therefore, is reversed, and you will readjudicate the claim accordingly.

RESTORATION—ACT OF MARCH 3, 1901—REMARRIAGE—WIDOWS.

HENRIETTA ELDRIDGE (WIDOW).

As the claimant has never received a pension and is not entitled to one under existing law, the act of March 3, 1901, conferred no benefit upon her.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions.
April 25, 1902.*

The Department has considered the appeal filed January 15, 1902, from the action of the Pension Bureau adverse to the claim of Henrietta How (formerly Eldridge) for pension as the widow of Rodney E. Eldridge, who served during the war of the rebellion as a private in Company A, Twenty-third Michigan Infantry.

The said soldier was killed while in the service and line of duty. September 18, 1864, leaving a widow (the appellant) and three children under 16 years of age. The widow filed an application for pension, under the provisions of the act of July 14, 1862, on January 9, 1865. While her application was still pending she remarried, October 11, 1865, taking for a husband one Nathan Ross. An application on behalf of the minor children was filed by their duly constituted guardian February 18, 1866, and on April 10, 1866, a certificate was issued granting them pension at the rate of \$8 per month, commencing from the date of the soldier's death. On March 9, 1867, a new certificate was issued allowing an additional pension of \$2 per month for each child, commencing July 25, 1866, in accordance with the provisions of an act of Congress approved on that date. The youngest child became 16 years of age November 9, 1875, and all pension then ceased. On December 15, 1873, the appellant obtained a divorce from Nathan Ross by reason of his having been sentenced to State's prison, and on June 20, 1874, she was united in marriage to one Emory How. How died May 28, 1898, since which date she has remained a widow. December 7, 1901, she applied for "restoration" of pension under the provisions of the act of March 3, 1901. Her application was rejected on the ground that having remarried in 1865, without completing her claim, and pension having been subsequently paid to the minor children from the date of the soldier's death, there was no law under which she could be pensioned. From that action she appeals, being unable to understand why she is not entitled under the act of March 3, 1901, which expressly states that "the remarriage of any widow * * * entitled to pension shall not bar her right to such pension to the date of her remarriage," etc.

The full text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section forty-seven hundred and eight of the laws of the

United States governing the granting of army and navy pensions be, and the same is, amended to read as follows:

The remarriage of any widow, dependent mother, or dependent sister entitled to pension shall not bar her right to such pension to the date of her remarriage, whether an application therefor was filed before or after such marriage; but on the remarriage of any widow, dependent mother, or dependent sister having a pension such pension shall cease: *Provided, however,* That any widow who was the lawful wife of any officer or enlisted man in the Army, Navy, or Marine Corps of the United States during the period of his service in any war, and whose name was placed or shall hereafter be placed on the pension roll because of her husband's death as a result of the wound or injury received or disease contracted in such military or naval service, and whose name has been or shall hereafter be dropped from said pension roll by reason of her marriage to another person who has since died or shall hereafter die, or from whom she has been heretofore or shall be hereafter divorced upon her own application and without fault on her part, and if she is without means of support other than her daily labor, as defined by the acts of June twenty-seventh, eighteen hundred and ninety, and May ninth, nineteen hundred, shall be entitled to have her name again placed on the pension roll at the rate now provided for widows by the acts of July fourteenth, eighteen hundred and sixty-two, March third, eighteen hundred and seventy-three, and March nineteenth, eighteen hundred and eighty-six, such pension to commence from the date of filing of her application in the Pension Bureau after the approval of this act: *And provided further,* That where such widow is already in receipt of a pension from the United States she shall not be entitled to restoration under this act: *And provided further,* That where the pension of said widow on her second or subsequent marriage has accrued to a helpless or idiotic child or a child or children under the age of sixteen years she shall not be entitled to restoration under this act unless said helpless or idiotic child or child or children under sixteen years of age be then a member or members of her family and cared for by her, and upon the restoration of said widow the payment of pension to said child or children shall cease.

SEC. 2. No claim agent or other person shall be entitled to receive any compensation for services in making application for pension under this act.

Approved March 3, 1901.

It will be seen that the act does not contain any grant of original pension, but provides only for the restoration of pension in certain cases wherein pension which had been or might be thereafter granted pursuant to other laws had terminated, or should thereafter terminate, by reason of the remarriage of the beneficiary. The appellant seems to have realized this fact when she filed her application, as said application is entitled a "Widow's declaration for restoration of pension," and contains the averment that she "was a pensioner during the time she remained soldier's widow." As a matter of fact, however, she was never a pensioner. The question to be considered is whether she is entitled to pension under any existing law.

Section 2 of the act of July 14, 1862, under which her original application was filed, provided:

That if any officer or other person named in the first section of this act has died since the 4th day of March, 1861, or shall hereafter die, by reason of any wound received or disease contracted while in the service of the United States and in the line of duty, his widow, or if there be no widow, his child or children under 16 years of age, shall be entitled to receive the same pension as the husband or father would

have been entitled to had he been totally disabled, to commence from the death of the husband or father and to continue to the widow during her widowhood or to the child or children until they severally attain the age of 16 years and no longer.

By the seventh section of the act of July 4, 1864, it was provided:

That on the remarriage of any widow receiving a pension, such pension shall terminate, and shall not be renewed should she again become a widow.

By section 4 of the act of March 3, 1865, entitled "An act supplementary to the several acts relating to pensions," it was enacted:

That if any officer or other person named in the first section of an act entitled "An act to grant pensions," approved July 14, 1862, has died since the 4th day of March, 1861, or shall hereafter die by reason of any wounds received or disease contracted while in the service of the United States and in the line of duty, his widow, or if there be no widow or in case of her death or remarriage without payment to her of any part of the pension hereinafter mentioned, his child or children under 16 years of age shall be entitled to receive the same pension as the husband or father would have been entitled to under said act had he been totally disabled, to commence from the death of the husband or father and to continue to the widow during her widowhood or to the child or children until they severally attain to the age of 16 years and no longer: *Provided*, That when such pension has been or shall hereafter be paid to the widow such child or children shall only be entitled to receive the pension to commence from the death or marriage of such widow and (to) continue as aforesaid: *Provided further*, That nothing herein contained shall be construed to repeal or modify the tenth section of an act entitled "An act supplementary to 'An act to grant pensions,' approved July 14, 1862," approved July 4, 1864, and said section is hereby declared to be in full force and effect in all cases arising under this act to which said section is applicable, saving and excepting such cases as are embraced in the preceding proviso.

So stood the law at the time the pension was granted to the children of the soldier, Rodney Eldridge, in April, 1866. Its provisions, so far as they are applicable to this case, may be briefly recapitulated as follows:

1. If the soldier left a widow she was entitled to the pension to which he would have been entitled if totally disabled, commencing from the date of his death and continuing during her widowhood; but

2. If the widow remarried without receiving any part of such pension, then the soldier's child or children under 16 years of age (if any there were) became entitled thereto to the exclusion of the widow.

As the appellant remarried in October, 1865, without receiving any part of the pension to which she would have been otherwise entitled, the minors were properly pensioned from the date of the soldier's death, and her pensionable rights were extinguished.

If the pension had not been paid to the minors for the period from the date of the soldier's death to the date of the widow's remarriage it might now be paid to the appellant by virtue of changes in the law made since 1865; but having been paid in accordance with the law at that time she has no title, as the law does not authorize the payment of two pensions for the same period on account of the death of the same

soldier. As she has never received a pension and has no title to one under existing law, the act of March 3, 1901, conferred no benefit upon her. The action of the Bureau is affirmed.

DISABILITY—RATE—ACT JUNE 27, 1890—SUPPORT.

EDWARD L. HOBART.

As appellant is disabled from all causes of a permanent character, not due to vicious habits, in a degree rendering him unable to earn a full support by manual labor, he is entitled to a rating under section 2 of the act of June 27, 1890.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 26, 1902.

Edwin L. Hobart, who served in Company D, Twenty-eighth Illinois Infantry, from August 3, 1861, to July 30, 1864, when transferred to Fifty-eighth United States Colored Infantry, where he served as first sergeant, second lieutenant, and first lieutenant, to April 30, 1866, filed claims for pension under the second section of the act of June 27, 1890, on July 23, 1890, July 26, 1894, November 26, 1897, and June 13, 1900, which claims were rejected January 24, 1893, February 23, 1894, November 22, 1899, and November 23, 1900.

He claimed pension on account of disability of a permanent character from loss of teeth from scurvy, lumbago, rheumatism, sunstroke, and debility from age.

From the rejection of November 22, 1899, on the ground that claimant was not disabled for manual labor in a degree pensionable under said act of June 27, 1890, he appealed, December 6, 1899, but on June 15, 1900, he filed in your Bureau a withdrawal of said appeal pending action on his claim filed June 13, 1900, which last-mentioned claim was rejected, as above stated, November 23, 1900, on the same ground as was the preceding claim, from which rejection the attorneys in the claim appealed, February 6, 1901, assigning the following as error:

1. Error on the part of the Commissioner of Pensions in failing to duly consider those physical infirmities of a permanent character not due to applicant's own vicious habits, the existence of which and the degree to which he is disabled thereby is shown in the report of the examining board at Denver, Colo., who examined applicant under date of August 3, 1900.

2. Error on the part of the Commissioner of Pensions in failing to apply to this case the instructions of the Secretary of the Interior bearing date of June 30, 1900, and which are in terms as follows:

"Giving attention now to that portion of the section which in the original and amended forms is expressed in somewhat different words, it is clearly commanded that each and every mental or physical infirmity of a permanent character, not the result of the applicant's own vicious habits, shall be duly considered and his right to a pension and the rate thereof shall be determined by the degree to which all of these infirmities, whether minor or serious, when considered together, render him unable to earn a support by manual labor."

As said withdrawal of claimant's appeal of December 6, 1899, was not reported to the Department for dismissal, and said appeal had not been dismissed when the last appeal was filed, the two were consolidated under one docket number.

Under the claims to which the appeals relate, appellant was examined by boards of examining surgeons at Denver, Colo., who make the following reports, viz: Under date of November 16, 1898—

Pulse rate, 72; respiration, 16; temperature, 98 $\frac{3}{4}$; height, 6 feet 1 $\frac{1}{2}$ inches; weight, 180 pounds; age, 54 years. Has lost all teeth; gums are atrophied. This condition is very probably the result of scurvy; has numerous scars on lower limbs of old ulcers, probably of scorbutic origin.

Claimant is tender over lumbar muscles upon pressure, and we believe he suffers from lumbago; back stiff in stooping; no other evidence of rheumatism excepting alleged pain in muscles of left arm; no crepitation, limitation of motion, or swelling of any joints.

Heart normal in size, apex beat seen and felt in fifth interspace; no murmur, edema, or cyanosis; pulse, standing, 84; after exercise, 96.

No objective evidence of sunstroke.

No further disability or evidence of vicious habits found. Claimant, in our opinion, is entitled to a ten-eighteenth rating on loss of teeth, as a result of scurvy, four-eighteenths on lumbago, but no rating on rheumatism or sunstroke. T. G. Hughes, president; S. D. Van Meter, secretary; Frank Dulin, treasurer.

Under date of August 3, 1900—

Pulse rate, 64, 72, 81; respiration, 20, 22, 24; temperature, 98.4; height, 6 feet 1 $\frac{1}{2}$ inches; actual weight, 180 pounds; age, 55 years. Point and area of apex impulse in the left fifth interspace three-fourth inch internal to the mammary line and evident to palpation only. Area of cardiac dullness normal, rhythm regular, free, and sounds normal, no murmurs, hypertrophy, dilatation, dyspnoea, oedema, or cyanosis. No rate. Measurement of chest at rest, 37 inches; full inspiration, 38 $\frac{1}{2}$ inches; full expiration, 36 inches; symmetrical, no rales, normal vesicular murmur and resonance. No rate. Crepitation well marked in both shoulders, with moderate tenderness; well-marked tenderness in both lumbar regions; aside from this no swelling or enlargement, stiffness or limitation of motion, atrophy or contractions of muscles or tendons. Rate, four-eighteenths. Claims to have suffered with scurvy in 1862, all teeth are gone, but the alveolar processes are intact. Wears artificial denture, both in upper and lower jaws. No rate. Has slight continuous headache, and states that memory is poor; there is marked intolerance of heart, with occasional vertigo; no loss of muscular power. Rate, four-eighteenths. Liver at the sixth rib and costal margin; stomach sensitive to palpation; spleen, skin, and tongue normal. Has inveterate constipation, which he relieves with laxatives and suppositories. No organic disease of stomach. Is well nourished. No rate. No other disabilities found to exist. No vicious habits and no venereal disease—either local or constitutional. Urine amber, acid reaction, specific gravity, 1022; no albumen and no sugar. Well nourished and muscles are firm. No rate.

In the opinion of this board the claimant is one-half disabled permanently for manual labor. William Robertson, president; M. H. Sears, secretary; W. E. Tyler, treasurer.

Dr. James C. Johnson, in an affidavit filed June 6, 1899, says:

That he is a practicing physician, and has been acquainted with the above-named soldier for about twelve years, and that during that time has frequently been called to see him professionally while suffering from attacks of rheumatism, often being unable to turn himself over in bed.

Within the last twelve months he has been employed in connection with the supply department of Colorado and Southern Railroad, and was last summer relieved on account of his disability to perform manual labor required and put on lighter work and has recently been entirely relieved, being unable to perform the labor required at all.

As to scurvy, I can testify to loss of teeth and evident symptoms of the claimant having had scurvy in a bad form. I never treated him for the scurvy complications, but have frequently prescribed for him for lumbago and other rheumatic conditions.

And in an affidavit filed October 26, 1899, he says:

That he has repeatedly treated him professionally for attacks of lumbago since 1894 to 1899. Said attacks continued for about ten days, during which time he was unable to help himself. That he averaged four or five of such attacks a year.

That in the intervals between said attacks he was prevented, by debility of muscles of back, from performing manual labor, and was therefore totally disabled from following such vocations. As to treatment, usual local and general remedies applied.

In an affidavit filed April 4, 1891, said witness states:

That he has been the family physician of the claimant, Edwin L. Hobart, and that he has treated him on different occasions for lumbago, the tendency to which prevents him from engaging in any manual labor which would require any lifting or working in a stooping position.

That during such attacks he is perfectly helpless and prostrate.

And in February, 1898, as follows:

I have attended Edwin L. Hobart repeatedly for the past three years for rheumatic troubles, mostly situated in the back; that the frequent attacks of this complaint prevent him from following any regular occupation, and often require the employment of another person to move him in bed. Further, that these symptoms are not the results of vicious habits, as he has no such habits.

In an affidavit filed October 31, 1899, Dr. John A. Gale testified as follows:

I attended applicant, E. L. Hobart, in July, 1898, for attack of traumatic lumbago, caused by lifting heavy casting at Colorado and Southern shops, where he was employed; attack required him to quit his work for a month; has had several attacks since, during 1898 and 1899, during which I attended him as company surgeon of the Colorado and Southern Railway. During May, 1899, he was obliged to surrender his place with the Colorado and Southern Railway Company, being unable to discharge his duties by reason of the suffering and disability resulting from said lumbago. Is disabled from earning his living by manual labor in consequence of chronic lumbago. I consider him disabled in three-fourths degree. This affidavit is in my own handwriting.

As far back as January 6, 1892, appellant was examined by a board of surgeons at Denver, who reported—

Pulse rate, 85; respiration, 18; temperature, 98.5; height, 6 feet 2 inches; weight, 180 pounds; age, 46 years. Scurvy. Has two brownish cicatrices on front of left shin, and two smaller ulcers, almost healed, on middle of front of right leg; has prematurely lost all teeth but two upper right, the lateral incisors and first bicuspid. Buccal mucous membrane and gums red and puffy—six-eighteenths. Lumbago. Has pain on stooping and is slightly tender in lumbar muscles; no other signs. Heart normal. No other disability found to exist—four-eighteenths. He is, in our opinion, entitled to a six-eighteenths rating for the disability caused by effects of scurvy, four-eighteenths for that caused by lumbago. F. F. Bancroft, president; J. E. MacNeill, secretary; A. K. Worthington, treasurer.

As incidentally bearing on the question of appellant's physical condition it may be stated that the War Department reports that he was wounded in breast severely at the battle of Pittsburg Landing, Tenn., April 6 and 7, 1862. Also "wounded—breast—very slight, spent ball, at battle of Pittsburg Landing, Tenn., April 6, 1862;" that he was treated from August 6, 1863, to ——— for typhoid fever; from September 1 to 24, 1863, for intermittent fever.

From the foregoing evidence is appellant entitled to a pension under section 2 of the act of June 27, 1890? Said section is as follows:

That all persons who served ninety days or more in the military or naval service of the United States during the late war of the rebellion, and who have been honorably discharged therefrom, and who are now or who may hereafter be suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits, which incapacitated them from the performance of manual labor in such a degree as to render them unable to earn a support, shall, upon making due proof of the fact according to such rules and regulations as the Secretary of the Interior may provide, be placed upon the list of invalid pensioners of the United States and be entitled to receive a pension not exceeding twelve dollars per month, and not less than six dollars per month, proportioned to the degree of inability to earn a support; and such pension shall commence from the date of the filing of the application in the Pension Office, after the passage of this act, upon proof that the disability then existed, and shall continue during the existence of the same: *Provided*, That persons who are now receiving pensions under existing laws, or whose claims are pending in the Pension Office, may, by application to the Commissioner of Pensions, in such form as he may prescribe, showing themselves entitled thereto, receive the benefits of this act; and nothing herein contained shall be so construed as to prevent any pensioner thereunder from prosecuting his claim and receiving his pension under any other general or special act: *Provided, however*, That no person shall receive more than one pension for the same period: *And provided further*, That rank in the service shall not be considered in applications filed under this act.

Said section was amended by the act of May 9, 1900, by adding the following:

And in determining such inability each and every infirmity shall be duly considered, and the aggregate of the disabilities shown be rated.

In your report of February 15, 1901, upon these appeals you refer to the opinion of your medical referee of February 14, 1901, which is as follows:

The medical action dated November 14, 1899, from which claimant appeals, is adhered to.

The attorneys in the case argue that the function of the medical referee was to determine only questions of how much pension should be granted—that is, to fix the rate.

Section 4776 of the Revised Statutes provides that—

The Secretary of the Interior is authorized to appoint a duly qualified surgeon as medical referee, who, under the control and direction of the Commissioner of Pensions, shall have charge of the examination and revision of the reports of the examining surgeons, and such other duties touching medical and surgical questions in the Pension Office as the interest of the service may demand.

Thus, under the statute, his function is to "have charge of the examination and revision of the reports of examining surgeons;" and to this is added "such other duties touching medical and surgical questions * * * as the interest of the service may demand."

By "such other duties," here mentioned, are meant such duties as the Commissioner of Pensions may assign to him, just as duties are assigned to the chief of the board of review, of the law division, and chiefs of other divisions. Considering the multiplicity of questions arising in, and duties growing out of, the administration of the pension laws, it will be readily understood that it would be impossible for the Commissioner to give to each case his personal attention, and thus it becomes necessary to divide the business, assigning one class to this division and another class to another division, but all subject to his supervision and control.

These chiefs are advisers to the Commissioner, but their opinions are not binding upon nor controlling with him. They, including the medical referee, are entirely subordinate to the Commissioner, as the Commissioner is to the Secretary.

The opinions of the medical referee are entitled to great weight. He is the medical adviser of the Commissioner on questions relating to an accurate knowledge of medical and surgical science, and his opinions on such questions are generally allowed to prevail, but are not binding upon the Commissioner.

The medical referee is required to examine, revise, and harmonize the certificates of examining surgeons with a view, as nearly as practicable, to securing uniformity in rating disabilities.

In this case the medical referee has indicated his opinion as to the question whether claimant's condition, as described by the examining boards, shows a disability of a permanent character, incapacitating him for earning a support, and the Commissioner has acted upon that opinion and rejected these claims for pension under the act of June 27, 1890, but it is noted that said medical officer gives no reasons for his opinion accompanying the report on the appeal.

Whether this was correct judgment is before the Department on all of the evidence, including the opinions of the experts, for its consideration and decision.

The question as to whether this appellant is incapacitated for earning a support in a degree entitling him to a rate of pension under the act of June 27, 1890, is not wholly a medical question.

But if it were, we have the evidence of the examining surgeons and other physicians as to claimant's physical condition, and their opinion as well as the opinion of the medical referee as to the degree of disability shown.

On questions of science or skill, or relating to some art or trade, persons instructed therein by study or experience may give their

opinions. Such persons are called experts. (Lawson's Expert and Opin. Ev., 2.)

The opinions of medical experts are not conclusive, but are to be weighed by the jury like all other evidence (id., 254). Great respect should be paid to the opinion of such a class of witnesses, but they are no more controlling than those of any other class or body of men, when speaking upon subjects which lie within the range of common observation and experience (id., 255).

In the case of *Carpenter v. Calvert* (83. Ill., 62), the court charged the jury that, all other things being equal, they should give greater weight to the opinions of physicians on the subject of the testamentary capacity of the testator than to other witnesses. On appeal this was held to be error. The supreme court of Illinois said:

Physicians may be regarded experts as to the condition of the body and as to what diseases tend to impair the mind; but it does not follow, from the mere fact that they are physicians, that they are any better judges of the degree of mental capacity than other men of good common sense.

This case seems to be directly in point with the one under consideration. We may accept the statements of the examining surgeons and other medical experts who have had claimant under their observation as to the condition of his body, but in what degree such condition incapacitates claimant for earning a support by manual labor is not exclusively a medical question. The opinion of the medical referee, however, as to the rate of pension a certain condition warrants should be given greater weight than the opinions of examining surgeons and practicing physicians generally, because of his every-day experience in such matters, having before him the varying opinions of a great number of experts. Experience has demonstrated that different boards vary widely in their opinions upon these questions, and it is the duty of the medical referee to harmonize these opinions with a view to establishing uniform rates for certain degrees of disability. The Department, in the consideration of cases on appeal, also has the benefit of the advice of experts in medical and surgical science, who have had special opportunities to inform themselves as to these conditions, and who have had experience in the medical division of your Bureau; as also the advice of persons skilled in the law and experts in the administration of the pension laws.

The Department is charged with the duty of executing the laws. The legislative branch can perform no executive acts, but it can prescribe laws to the executive which that department and every grade of its officers must obey. (Sutherland on Construction of Statutes, sec. 21.)

It has frequently been declared that the pension laws should be construed in the same liberal spirit that prompted their enactment, and whenever the Bureau or the Department has attempted, in the interest of economy or for other reasons, to place a strict or narrow construc-

tion on the act of June 27, 1890, or a construction not fully in accord with the liberality which prompted its enactment, Congress has promptly passed a statute directing how said law should be executed in the particular complained of, as, for instance, the acts of December 21, 1893, March 2, 1895, March 6, 1896, and March 13, 1896.

These statutes mark the path of duty for the executive in construing and executing said law, and it devolves upon the officer charged with the administration of the law to give it that liberal construction indicated by Congress, without regard to questions as to the expenditure involved; and while the Department carefully guards the interests of the Government in the administration of the laws, it can not disregard the mandates of Congress, from which is derived all authority for the disbursement of the public funds, and to whose consideration such questions must properly appeal.

In this case the description of appellant's physical condition has been given us by nine official examining surgeons, and by appellant's family physicians, who have also expressed their opinion as to the degree of disability resulting from his condition, and the Department, giving due consideration to the views of your medical referee, is of the opinion that appellant's physical condition, not due to vicious habits, warrants a rate of pension under the second section of the act of June 27, 1890, from the date of filing the declaration of June 13, 1900, as shown by the certificates of medical examination had under the claim, and the testimony of the physicians who have had claimant under their observation and treatment, on account of the disability due to lumbago, intolerance of heat, and vertigo and loss of teeth.

The board who examined him November 16, 1898, recommended a rate of \$14, and the board who last examined him state that he is one-half disabled for the performance of manual labor; and many of his acquaintances who have testified in his general law claim (which is still pending), state that he is able to perform very little manual labor. The Department in the case of James Caldwell (9 P. D., 486), referring to evidence disclosing a disability—as stated in the act—“which incapacitates them from the performance of manual labor in such a degree as to render them unable to earn a support,” said:

This language indicated the obvious purpose and intention of Congress to fix the maximum rate therein mentioned to correspond with a total disability, and the minimum and intervening rates to correspond, proportionately, with all partial degrees of inability to earn a support by manual labor. The material question there arises: Does the evidence and medical data * * * show with moral and reasonable certainty that appellant is partially disabled within the meaning of the act—is he disabled in such a degree as to be unable, by the performance of manual labor, to earn an entire support for himself? If so, he is entitled, at least, to the minimum rating under the statute.

In harmony with the decisions of the Department in similar cases, the action of the Bureau of November 23, 1900, is reversed. The withdrawal by the claimant of his appeal filed December 6, 1899,

before mentioned (pp. 2 and 3), was found among the papers in the case, but the same was not regularly filed in this Department. It bears the stamp of your Bureau as having been filed there June 15, 1900, and is also stamped as having been filed in the southern division of your Bureau June 16, 1900, and in the old war and navy division on June 25, 1900, but is before the Department now for the first time. In view of the withdrawal of said appeal by the claimant the same will not now be considered.

The papers are returned herewith.

It is noted that appellant after the close of the war of the rebellion enlisted in the Regular Army in Company I, Thirty-third United States Infantry, and deserted therefrom November 2, 1868, and was granted a deserter's release December 23, 1901, under the act of Congress approved April 11, 1890 (26 Stat. L., 54). This fact, however, does not affect his pensionable status under the law, as he complied with all of his contracts for service during the war of the rebellion and rounded out that service by honorable discharge.

The Department holds that to entitle a claimant to pension under the second section of the act of June 27, 1890, for service performed during the war of the rebellion he must have received an honorable discharge from all service contracted to be performed during said war; but having been honorably discharged from all such service, a desertion from a service contracted before or since said war is no bar to pension on account of such service during said war of the rebellion. See cases of James W. Miller (8 P. D., 416), decided October 26, 1896, John Norton, (9 P. D., 382), decided June 21, 1898, and cases therein cited.

MARRIAGE AND DIVORCE UNDER THE LAWS OF PENNSYLVANIA AND ILLINOIS—IMPEDIMENT.

LOLA T. HARVEY (AS WIDOW).

Appellant was married to the soldier in the State of Pennsylvania, June 13, 1886, in conformity with the laws of said State, and thereafter lived with him as his wife in the State of Illinois to the date of his death in 1898. At the time said marriage was celebrated soldier had a wife living who was divorced from him September 20, 1886, which fact was not known to appellant until after soldier's death.

Held: That appellant's marriage to soldier in June, 1886, was void, and that, under these facts, and the laws of Pennsylvania, where this second marriage was celebrated, and of Illinois, where the parties resided at the time the right to pension accrued, a marriage subsequent to the removal of the impediment to a valid marriage between the parties by the divorce of soldier's first wife in September, 1886, can not be presumed, and appellant can not be regarded as the widow of said soldier for pensionable purposes. See cases of Cartwright et al. v. McGown (121 Ill., 388), and Sarah C. Hayden (8 P. D., 364), and cases therein cited.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
April 30, 1902.*

Lola T., widow of Robert B. Harvey, formerly private, Company F, Nineteenth Pennsylvania Volunteer Cavalry, filed a declaration for pension under the act of June 27, 1890, on August 12, 1898, which was rejected February 17, 1899, on the following stated ground:

That claimant is not the legal widow, as at the time of her marriage to the soldier he had a wife living and undivorced.

From this action the claimant, by her attorneys, filed the following appeal, February 24, 1899:

The facts of the case are that claimant was married to the soldier on June 13, 1886, in ignorance of the fact that he had a wife then living and undivorced. Said former wife was divorced from soldier on September 20, 1886. The claimant lived with the soldier from the date of the marriage to him until the date of his death in 1898. It is submitted that the holding of the Bureau that she is not his legal widow is an error of law.

From the date of marriage until the date of death the soldier and the claimant lived in Illinois, in which State a "common-law marriage" is legal. It is submitted that the cohabitation of the soldier and the claimant subsequent to September 30, 1886, created a valid marriage. The claimant was in ignorance of the existing impediment to the marriage, and the evidence shows that the parties intended the cohabitation to be matrimonial. The soldier always recognized the claimant as his wife, and took out insurance policies in her favor, describing her as his wife therein.

The case seems to be in all respects similar to that of Margaret L. Thomas (9 P. D., 139), wherein it was held—

"That as claimant was the innocent party, and was kept in ignorance of the fact that a legal impediment to her marriage to soldier existed at the time of such marriage, and that during all the time from the removal of the impediment in 1877 to soldier's death in 1895 the parties cohabited together as husband and wife, uniting in conveyances, and joining in church membership, and deporting themselves generally in accordance with good morals, and being universally recognized by their neighbors, friends, and acquaintances as husband and wife, a valid marriage subsequent to the removal of the impediment will be presumed."

Also see case of widow of William F. D. Bailey, Company G, Thirty-second Wisconsin Infantry, certificate No. 422955, wherein the same state of facts existed, and the widow was granted a pension, and the subsequent action of the Bureau of Pensions dropping her name from the rolls was reversed on appeal.

This appeal raises the question whether a common-law marriage arose in Illinois after the removal of the impediment to the marriage in accordance with the laws of Pennsylvania.

Section 2 of the act of August 7, 1882, is as follows:

That marriages, except such as are mentioned in section forty-seven hundred and five of the Revised Statutes shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued. * * *

The soldier in this case was a resident of the State of Illinois, and the claimant of the State of Pennsylvania at the time of the marriage,

but they at once went to Illinois, after the marriage ceremony, and lived there until the soldier's death in 1898.

It is conceded that the soldier and claimant were married by a ceremony fully in conformity with the laws of Pennsylvania on June 13, 1886. But it appears that at the time of said marriage the husband had an undivorced wife living and who was not divorced from him until September 20, 1886. In accordance with the law of Pennsylvania, and, as is the rule universally in this country, the marriage thus solemnized was void. Up to this point there is no contention as regards the facts or the law. But it is contended by the appellant that a common-law marriage in Illinois is established by the facts, and on that she bases her title to pension.

As to this contention the law of Illinois, as construed by the courts of that State, must prevail.

In the case of *Gordon v. Gordon* (141 Ill., 160), the supreme court says:

A marriage of a woman with a man who has a wife, or a man with a woman who has a husband, living and undivorced, is void, not merely voidable. It will make no difference that the marriage was made honestly in faith of a decree of divorce, which the person making it was assured by his attorney had been rendered; the belief of the party does not alter the legal character of the act.

In the case of *Schmisseur v. Beatrice* (147 Ill., 210), in citing facts nearly similar to the case in issue, the court said:

A subsequent divorce decree will not legalize the marriage.

In the case of *Port v. Port* (70 Ill., 484), it is held:

The cohabitation of two persons of different sexes, and their behavior in other respects as man and wife, always affords an inference, of greater or less strength, that a marriage has been solemnized between them; yet such inference is destroyed by evidence that no marriage, in fact, ever was solemnized.

The case of *Cartwright et al. v. McGown* (121 Ill., 388) is the leading case in Illinois on the issue here, and the facts are nearly in point. In that case certain brothers and sisters and the mother of a decedent filed a bill for partition of certain lands of which he died seized. The bill was framed on the theory that the deceased left no lawful issue capable of taking by inheritance. A wife and child appeared and submitted proofs, and after a hearing the bill was dismissed, and the complainants prosecuted a writ of error. The facts in the case were in all essential particulars like the one under consideration. It seems that the decedent was married by ceremony in 1843 to the mother of the child claiming the right of inheritance, but it was shown that the decedent had an undivorced wife living until three years after said marriage, when she secured a divorce from him. It was contended that the facts in the case created a presumption of lawful marriage after the divorce in 1846. On this point the court says:

This formal marriage being void, do the facts and circumstances proved create a presumption of lawful marriage of Lewis (decedent) and Zeralday (the claiming

widow) after the divorce in 1846? No record of any subsequent marriage has been produced, nor has any witness testified directly as to any such marriage; but it is strenuously insisted that the evidence will justify the court in presuming a common-law marriage of the parties after the impediment to their legal union was removed.

It will be noted that the issue that was before the supreme court of Illinois at that time is exactly the issue involved herein.

The court goes on:

The proof here fails to show any license for the marriage of Lewis after the divorce, * * * nor is there any direct evidence of any marriage of the parties after the divorce *per verba de presenti*, or *per verba de futuro cum copula*; but the court is asked to infer such a marriage from the long-continued cohabitation and their reputation of being married at same time. * * * The evidence in the record is amply sufficient to show that Lewis and Zeralday lived and cohabited together as husband and wife for a period of about twenty-five years, and that during all this time he treated her as a man would a wife, and her children as his own, and that they were reputed as husband and wife. But it must be borne in mind that cohabitation and repute do not constitute a marriage, but are only evidence tending to raise a presumption of marriage, of more or less strength, according to the circumstances of the case, and that the cohabitation must not be meretricious but matrimonial, in order to give rise to this presumption. (1 Bishop on Marriage and Divorce, sec. 266.) Where a marriage in fact is shown by direct evidence, as in this case, there is no necessity for presuming its existence. Presumption must yield to the superior force of direct and positive proof. In this case there was an actual marriage ceremony performed in 1843, by which Lewis and Zeralday were apparently and ostensibly married. Their cohabitation thereafter and reputation as to being married might very naturally and properly be referred to the fact of this apparent marriage, there being nothing to indicate to their acquaintances and neighbors that it was void. If no actual marriage ceremony had been shown, then the cohabitation and repute proved might be referred to some supposed informal common-law marriage. This cohabitation and repute is not shown as evidence of the ceremonial marriage in 1843, but of some other kind of marriage entered into some time after the divorce in December, 1846. * * * If this evidence could, by any known rule, be so limited as to show cohabitation and repute from some day after the divorce, when no impediment existed, it might afford evidence of a common-law marriage of the parties by their own acts. If the cohabitation and repute were the result of the assumed marriage in 1843, which was void, it was illicit and not matrimonial, and no marriage can be presumed from illicit sexual intercourse. * * * It may be said that the holding of Zeralday out to the world as his wife showed a desire to change his connection with her to that of marriage. But little importance can be attached to this circumstance when considered in connection with the other facts in the case. * * * The holding her out as his wife before the divorce was a fraud and a deception, and if Lewis would attempt to deceive the public by creating false appearances prior to 1846, why may not his subsequent acts also have been actually deceptive and fallacious? As said before, there is no evidence in the record showing that Zeralday ever knew that Lewis had a wife living at the same time she supposed she married him. She was deceived and imposed upon by Lewis, in his falsely assuming to have capacity to marry her, and concealing the fact of his prior marriage to a then living and undivorced wife. Not knowing of the former marriage, she could have no reason for desiring a second marriage. If she regarded herself as the lawful wife of Lewis, it would be a violent presumption to hold that she assented to a second informal marriage. * * * The fact that Mrs. Lewis had no knowledge of the invalidity of the marriage, and therefore the cohabitation on her part was not criminal, can not validate the assumed marriage even as to her. If valid as to her, it must be equally so as to him. A con-

tract not mutually binding is void for want of mutuality. The most that can be said is that Mrs. Lewis was not liable to criminal punishment for living with a man she supposed, in good faith, was her husband.

So much of the case has been quoted to show what the Illinois court holds in a case such as the one under consideration. The case is reported in full in the case of Mary B. McCollum (6 P. D., 93) and may there be more fully studied.

It is conceded that the rule laid down in Illinois does not obtain in many of the other States of the Union, as note Margaret L. Thomas (9 P. D., 139), a Michigan case, and the case of the widow of William F. D. Bailey, decided by the Department January 8, 1898, a Wisconsin case, both being cited by appellant.

As to the law of Pennsylvania, where this marriage was celebrated, see case of Sara C. Hayden (8 P. D., 364) and cases therein cited.

The undisputed facts in this case are that the soldier married claimant in June, 1886, in the State of Pennsylvania, and at once took her with him to Illinois, of which State he was a resident; from that date until his death they lived in Illinois as man and wife; one child was born and bears the soldier's name; they were known as man and wife in the community where they resided, and he took out insurance in the claimant's name.

The testimony of claimant is that the soldier told her he was divorced from his first wife and she believed him and did not know anything different until after his death, when she discovered from court records that as a matter of fact a divorce was not obtained by the first wife until three months after the marriage.

Applying these facts to the law of Illinois as expounded by the supreme court of that State in the Cartwright case (*supra*), the conclusion must follow that the claimant would not be recognized as the widow of the soldier in that State. This being so the act of August 7, 1882, must be applied, and the claimant has no title to pension.

It is to be observed that while the soldier told his wife he was divorced from his first wife he is presumed to have known differently. He took his new wife to Illinois and there, no doubt, introduced her as his wife, as a result of the ceremonial marriage in Pennsylvania, which is shown by record evidence to have been void. Now, under the decision of the supreme court of Illinois, no new promise can be presumed to support a common-law marriage, for the reason that the claimant could have had no ground for wanting any new relationship, she believing all the time that the ceremonial marriage was a valid and binding one. In other words, there is no ground for presuming a thing which the facts in a given case positively preclude.

It is conceded that this claimant is in an unfortunate situation, but the law affords her no relief. If she were to appear before the Illinois courts to establish her widowhood in a civil proceeding there can be

no doubt but that under the decision in the Cartwright case (*supra*), which does not appear to have been modified by later decisions, she could not sustain her claim.

The action of the Bureau from which appeal is taken is, therefore, affirmed.

RATE, ACT JUNE 27, 1890—INCREASE—PRACTICE—ELECTION.

OSCAR CALDWELL.

1. The claimant is receiving \$10 per month under the general law and he was allowed the same amount under the act of June 27, 1890. He has taken no action in relation to the notification as to his right to elect under which law he prefers to receive pension, but the attorney has appealed from the action and allowance under said act. It is held that the claimant was shown by the medical examination to be entitled to the maximum rating, and it is directed that this rating be allowed.
2. Whenever it is shown prior to adjudication that a claimant's disability has been materially increased after his official examination, another medical examination shall be ordered before the claim is rejected or adversely adjudicated, unless such action is based upon legal grounds. It is immaterial whether the claim is for original pension or for increase of pension under either the act of June 27, 1890, or the general law: Provided, of course, the disability under the general law is shown to be due to the pensioned cause or causes, or to a cause or causes which have been legally accepted.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 9, 1902.

Oscar Caldwell, late a sergeant in Company I, Second Michigan Volunteer Cavalry, is now receiving \$10 per month under the general law on account of left varicocele; certificate No. 238542.

He filed, on August 23, 1901, a claim for additional pension under the act of June 27, 1890, alleging that he was wholly disabled and unable to earn a support by reason of rheumatism, disease of heart, paralysis, varicose veins, and senility. The medical examination under this claim was made October 2, 1901. The claim was adjudicated in March, 1902, when a rating of \$10 was allowed, and the claimant was advised of his right to elect whether he would accept said rating in preference to the same amount which he has received from an earlier date under the general law.

In the meantime it appears the claimant had a cerebral hemorrhage, December 16, 1901, with resulting paralysis of the left arm and leg. This fact was set forth in an affidavit of Dr. A. H. Rockwell which was filed in the Pension Bureau on January 8, 1902, and the doctor stated that the claimant was totally and permanently incapacitated for performing any manual labor. No attention appears to have been given to this testimony, however.

The claimant has taken no action in relation to the notification as to

his right to elect; but the attorney on April 9, 1902, filed an appeal to the Department, in which he contends that the claimant was shown to be entitled to the maximum rating under the act of June 27, 1890, from the date of filing his claim.

The report of the official examination showed that the soldier was 70 years of age. The left varicocele presented a tumor 3 by 4 inches in diameter; tender. There was also a varicocele on the right side, 2 by 1½ inches in diameter. Both shoulders were "creaky and limited in motion about 45 per cent in all directions because of pain and increased joint tissue." The muscles of the neck and back and lumbar region were tender. The knees were creaky. The heart was "irregular, intermittent, irritable, hypertrophied, dilated, and weak;" its apex beat was 1 inch below the nipple and there was an apex systolic bruit. Cyanosis was present. There was no special dyspnoea except upon exercise. There was no special oedema of the feet. The respiratory murmur was greatly deficient and there was dullness on percussion. The internal saphenous vein of the right leg was enlarged from one-half to three-fourths inch from the knee to the ankle; the leg was eczematous and tender on the inner surface. The claimant was described as very feeble and barely able to move around.

The Department is clearly of the opinion that the conditions described in this report warrant the allowance of the maximum rating for total inability to earn a support by manual labor from the date of filing the claim. The action from which the appeal was taken is therefore reversed and the claim is remanded for readjudication in accordance with the views herein stated.

Another matter is presented in this case which, on account of its relative frequency in cases of a similar character, requires further consideration. It has been noted above that no attention was paid to the medical testimony showing that the claimant had a cerebral hemorrhage subsequent to the official examination and was totally and permanently incapacitated, although said testimony was filed nearly three months before the adjudication of the claim; and yet the allowance was only \$10 per month. It appears to the Department that, as the medical referee held that said examination did not warrant the maximum rating, this testimony required another medical examination in the claimant's interest before the adjudication and allowance of his claim with a rating below the maximum provided by the act of June 27, 1890. In such a case, when apparently reliable testimony has been filed showing a marked accession of disability subsequent to the date of an official examination, common justice demands that another medical examination be made before the claim is adjudicated adversely to the claimant.

The liability of disabilities to increase with the lapse of time has led to the adoption of the following rule in the adjudication of claims

under the general law (see the Treatise on the Practice in the Pension Bureau, page 40):

When no medical examination has been made of the claimant within three years of the time of adjudication of the claim, it will not be admitted without another medical examination.

Substantially the same rule is found on page 96 in relation to claims for invalid pension under the act of June 27, 1890, to wit:

In all cases where the medical examination was made more than three years prior to the date of the adjudication of the claim, another examination will be ordered before the claim is allowed.

These rules are just and proper, and they have been adopted in the interest of claimants. While his claim is pending a claimant certainly has the right to show that his disability has increased, even after his official medical examination; and he has an equal right to another medical examination under such circumstances prior to the adjudication and rejection of his claim. These rights should not be denied, nor should testimony be ignored.

The survivors of the war of the rebellion are all past the meridian of life, and their ranks are being rapidly depleted. They are now especially liable to accessions of disability or the occurrence of sudden and serious affections. When such survivor—an applicant for pension or increase of pension—becomes seriously disabled after his official examination, it may work a hardship or jeopardize his rights to refuse him another examination before the adjudication of his claim. Greater care should be taken in this class of cases.

Whenever it is shown prior to adjudication that a claimant's disability has been materially increased after his official examination, another medical examination shall be ordered before the claim is rejected or adversely adjudicated, unless such action is based upon legal grounds. It is immaterial whether the claim is for original pension or for increase of pension under either the act of June 27, 1890, or the general law: Provided, of course, the disability under the general law is shown to be due to the pensioned cause or causes, or to a cause or causes which have been legally accepted.

It is believed that this rule frequently obtains, but attention is especially drawn to the matter at this time because of the number of exceptional cases.

MARRIAGE AND DIVORCE—IMPEDIMENT—EVIDENCE.

SELIA AMBERS (WIDOW).

In a case where the evidence establishes the marriage of claimant to the soldier, and there is no evidence that the parties were incapacitated for marriage at its date other than the soldier's own statement that he had been previously married, in which he also said that his former wife had died before his marriage to claimant, the marriage is not successfully attacked nor its validity destroyed.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions.
May 13, 1902.*

Selia Ambers, as widow of George L. Ambers, formerly private Company H, One hundred and thirty-sixth Illinois Volunteer Infantry, filed claims for pension under the general law and the act of June 27, 1890, in 1895, which were rejected June 21, 1900, on the following stated grounds:

Approved for rejection; no proof of death of soldier's first wife and claimant's declared inability to furnish same.

July 20, 1900, the claimant, by her attorneys, filed an appeal to the Department alleging that the Bureau was in error in its consideration of the evidence in the case, also requesting that the case be sent to the field for special examination.

An examination of the evidence in the case gives no assurance that a special examination would yield any material evidence, because of the date of the soldiers' prior marriage and the meager information as to where it was celebrated. The evidence, it is believed, is sufficient of itself upon which to reach a proper conclusion under the law.

It shows that the claimant was married to the soldier January 4, 1890, which ceremonial marriage is established by the testimony of eyewitnesses. The soldier died March 8, 1894. In her declaration the claimant stated there was no bar to her marriage to the soldier, and that she and the soldier had both been previously married. The evidence shows the death of her first husband. On May 12, 1900, appellant filed an affidavit in the claim containing the following:

The claimant states that she is the identical Selia Ambers who has made application for pension as the widow of George L. Ambers. * * * The claimant states that she has written letters to different parties to find the date of death of George L. Ambers's first wife. She states that she does not know the name of the deceased soldier's first wife, and does not know the date of the death of her husband's first wife and can not furnish it. * * *

September 11, 1895, the affidavit of John Galloway was filed in the claim. He swore he knew claimant's husband before and after the war, and that said husband lived with him in 1865, and that he saw him in 1875, and that he told the affiant that he had been married, but that his wife and child were both dead.

October 9, 1895, the affidavit of Susan E. Harland was filed, in which she stated that George L. Ambers told her that he was married in 1867, in the month of February, and lived with his first wife until 1870, when she died, in the month of November; and that they were married near Chicago, but she did not remember the town.

In her claim filed under the act of June 27, 1890, the claimant made the following statement, after asserting there was no legal barrier to her marriage to the soldier:

This being the second marriage of both the claimant and her husband. Their former marriages were dissolved by the death of the former husband of the claimant, and by the death of the former wife of the claimant's husband.

The above is substantially all the evidence in the claim bearing on the question in issue. As a matter of fact there is just as much evidence in this case that the first wife of the soldier was dead as there is that the soldier was married to her. There is no known rule of evidence that permits halving the statement of a witness and accepting one half as true and the other half as false, where upon the face of it the statement is true and the witness is of good repute.

Upon what theory the Pension Bureau accepted the statement of the claimant and her witnesses as to a prior marriage of the soldier as true and utterly disregarded that portion of said statements which showed that the first wife was dead long prior to the marriage in issue, is not clear.

In the case of Sarah Buchanan (10 P. D., 423) the Department held:

The only evidence of a prior marriage of this sailor being his own statement, in which he also says that he was divorced from such marriage before and was a widower at the time of his formal remarriage to claimant, with whom he lived for twenty-five years thereafter until his death; such remarriage is held to have been a valid one, and claimant his lawful widow, notwithstanding there is no corroborative evidence of such divorce from the prior marriage, or of the first wife's death.

See also the case of Jennette Burton (9 P. D., 31).

In the case of Lizzie Yates (10 P. D., 446) the Department held (syllabus):

The mere fact that Yates was a "widower" when he married claimant is assumed by the Bureau of Pensions to be sufficient ground on which to compel claimant to furnish positive evidence of the death or divorce of the former wife. *Held*, claimant having shown a ceremonial marriage, and there not being the shadow of a suspicion (beyond the fact that the officer was a widower) that claimant's marriage was not a lawful one, the burden of proof is upon the Government to show the illegality of such marriage.

See also case of Mary M. A. Wood (11 P. D., 158).

In the case of Mary J. Stocker (9 P. D., 506) the general doctrine was broadly stated that it is incumbent on a claimant whose husband (soldier) was previously married to establish the death or divorce of such former wife. Nothing was said in that case to the effect that a claimant must establish that fact by positive evidence.

A fact is said to be established when the evidence proves it, no matter what kind of evidence is presented. (1 Greenleaf, par. 1, et seq.) Circumstances and presumptions of fact are competent evidence in any case.

The Bureau called upon this claimant to establish the date of the death of the soldier's first wife, and because she said she could not do so, her claim was rejected. There is no authority of law for such action. So far as the evidence in the case under consideration shows, the formal marriage of the claimant with the soldier is met by no evidence that comes anywhere near overcoming the presumption of its validity. All the evidence in the case shows that both parties had

capacity to marry. The mere fact that the soldier had been married (or is said to have been married before his marriage to claimant) is not sufficient to defeat her title to pension as his widow.

In any given case where the evidence establishes the marriage of the claimant with the soldier, and there is no evidence that the parties were incapacitated for marriage at its date, the only evidence of a contrary nature being that one of them was at some time prior married to another, the marriage in issue is not attacked in any way which approaches a destruction of its validity.

The action of the Bureau from which the appeal was taken was clearly erroneous and is hereby reversed.

DIVISION OF PENSION—NECESSITOUS CIRCUMSTANCES—JURISDICTION.

ELIZA FISHER *v.* WILLIAM A. FISHER.

A wife who owns a house and lot valued at \$1,150, a lot valued at \$65, household furniture valued at \$50, has \$150 in bank, and rents a house for which she pays \$600 per annum, and by subleasing of rooms supports herself, is not in necessitous circumstances within the provisions of the act of March 3, 1899, and is not entitled to one-half her husband's pension of \$17 per month, he being without other means of support than his daily labor.

The declaration filed by claimant July 17, 1899, for division of her husband's pension based on desertion was void and conferred no jurisdiction on the Commissioner of Pensions to suspend or withhold pension or any portion thereof, or to pass upon the question of desertion, as the desertion named in the act of March 3, 1899, could not exist until after the expiration of six months from the passage of said act. *Rothery v. Rothery* (11 P. D., 77 and 377); *Richards v. Richards* (ibid., 90); *Henry M. Rothery* (ibid., 255), and *Millard v. Millard* (12 P. D., 262).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 13, 1902.

William A. Fisher, late private, Company I, Eighth Indiana Cavalry, and pensioner under certificate No. 281556, appealed January 31, 1900, from the Bureau action of December 22, 1899, allowing the application of Eliza Fisher, filed July 17, 1899, for division of pension under the act of March 3, 1899, on the ground that "pensioner deserted claimant."

He filed a supplemental appeal May 7, 1900, in which he alleged that he had filed an appeal September 28, 1899, and in which he alleged that he was denied the right of being present at the special examination of his wife and other witnesses who were specially examined.

The papers in the case fail to disclose any appeal of September 28, 1899, or any appeals other than the appeals of January 31, 1900, and May 7, 1900.

The appeals were considered in part by the Department September 30, 1901, when the papers were returned for compliance with the rule in the Ellis case (11 P. D., 288) as to proof of service of notice.

March 17, 1902, the papers were transmitted to this Department with the following report:

I have the honor to transmit herewith the papers in the claim of William A. Fisher, late private, Company I, Eighth Indiana Volunteer Cavalry, Certificate No. 281556, together with the papers in the claim under the act of March 3, 1899, of Eliza Fisher, his wife.

The latter claim was filed originally on July 17, 1899. A new declaration was filed November 15, 1899. The claim was allowed December 22, 1899. An appeal was made for a reconsideration by this Bureau, and on February 18, 1901, said appeal was dismissed and payment to the wife continued. Prior to this latter action, and on January 31, 1900, an appeal was filed, docket No. 60557. This appeal reached the law division September 23, 1901, and on said date the papers were forwarded to the Department as per copy of letter on file with appeal. On September 30, 1901, the Department returned, for further action and report, all papers in the claim. The instructions of September 30, 1901, of the Department and the papers in the case were not received in the law division until March 14, 1902, this delay evidently occurring through some error on the part of some clerk in this Bureau in sending the papers direct to the board of review instead of to the law division, which would have been the proper course.

As the instructions of the Department of September 30, 1901, are to the effect that the appellee be served by the appellant with the usual notice under the Ellis rule, and as the practice relative thereto has, since September 30, 1901, been changed from this Bureau to the Department, all the papers are returned to the Department so that that rule may be complied with.

Pensioner contends, in brief, that claimant has all his property, including a house and lot worth about \$2,000, all their household furniture, a lot valued at \$175, has money in the bank and is not in necessitous circumstances; that he has no means of support aside from his pension; is in poor health, suffering from his wound and disease; that he does not drink or gamble; that he desires to resume his marital relations with his wife, but she closes the door in his face and refuses to talk to him, and that he will willingly surrender all his pension to her if she will live with him or permit him to live with her.

On further consideration of the appeal the Department is of the opinion that the papers filed by claimant November 15, 1899, and designated by the Bureau as "a new declaration," is but an affidavit filed in support of her original declaration filed July 17, 1899, and that it is not and does not purport to be a declaration or application for division of pension under the act of March 3, 1899. In another affidavit executed by claimant on the same date and filed at the same time, she testified—

that she is the owner of the following real estate in the city of Nobleville, county of Hamilton, and State of Indiana, viz:

One house and part of lot of the probable value of \$1,000; one vacant lot of the probable value of \$50; personal property consisting of household goods only, \$50; that the income from the foregoing does not exceed in any one year the sum of \$75 per annum.

Both of these affidavits were evidently filed in response to Bureau calls for testimony under her declaration filed July 17, 1899, wherein

she alleged that her said husband, the pensioner, deserted her over two years prior to July, 1899.

This declaration being based on desertion and filed less than six months from the passage of the act of March 3, 1899, was premature, inoperative, and void, and conferred no jurisdiction or authority upon the Commissioner of Pensions to suspend or withhold pension or any portion thereof, or to pass upon the question of the alleged desertion, for the reason that no such desertion as is designated in said act could exist, or be proved to exist prior to the expiration of six months from the passage of said act.

The language of that act is:

That in case a resident pensioner of the United States shall for a period of over six months desert his lawful wife, she being a woman of good moral character and in necessitous circumstances, * * * the Commissioner of Pensions is hereby directed, upon being satisfied by competent evidence of such desertion, to cause one-half of the pension due or to become due said pensioner during the continuance of such desertion to be paid the wife. * * *

All acts of Congress, unless otherwise provided, speak or become operative from the date of their enactment. (Sutherland on Statutory Construction, pars. 104 and 106)

When the act of March 3, 1899, provided that in case a pensioner "shall for a period of over six months desert his lawful wife" it spoke from the date of enactment, and referred only to future desertion of over six months, or the continuance of a past desertion (desertion being a continuous act) for over six months in the future. The act is therefore prospective and not retroactive in its terms and operation. *Rothery v. Rothery* (11 P. D., 77 and 377); *Richards v. Richards* (ibid., 90); *Henry M. Rothery* (ibid., 255); *Millard v. Millard* (12 P. D., 262).

Even assuming that the affidavit of November 15, 1899, should be treated as a declaration for the purpose of continuing a division of pension from that date, it is evident from claimant's admissions, as well as the uncontradicted testimony in the case, that she was not then and has not since been in "necessitous circumstances" within the meaning of said act of March 3, 1899.

Claimant testified before the special examiner April 9, 1900, that since the separation from her husband in 1896 she owned and had title to the house and lot where they lived in Noblesville, Ind., and that she also owned a vacant lot; that this property was unincumbered and would bring, she thought, at forced sale \$1,100; that since 1897 she had rented this property, receiving \$10 per month rent; that she rented the house in which she lived in Indianapolis, Ind., for which she paid \$50 per month; that she rented out the rooms in this house at about \$65 per month, and that by hard work and close living she could make ends meet, and pay her bills, including hired help, gas bills, taxes, and water rates; that she had \$150 in bank at Noblesville, Ind., which she had saved up from the rent of the house, which was

the accumulations of three years; that her son-in-law, Mr. Davidson, attended to her business for her and could corroborate her statements.

Mr. Davidson testified before the examiner April 11, 1900, that claimant owned a house in Noblesville, Ind., worth at cash sale about \$1,150, which rented at \$10 per month, except one month, when it was vacant; that she also owned a vacant lot worth at forced sale about \$65; that the taxes, insurance, and repairs on her said property for the last year amounted to about \$35, and that her income from said property would amount to about \$75; that she had no other property except \$150 in bank—the saving from the rent of house.

The evidence shows that pensioner has no property, real or personal, aside from his pension of \$17 per month; that he is in feeble health and earns his living, aside from the aid supplied by his pension, by his daily labor.

Pensioner's condition in life becomes material in determining the "necessitous condition" of the wife, as those words in the statute naturally refer to her need of those necessities suitable to her situation and his condition in life, and which the husband is bound to provide or for which he is liable on an implied contract, in case he fails to provide. See 2 Kent, p. 146; 15th Am. and Eng. Ency. of Law (2d ed.), p. 875, *f* and note 1, p. 877; Clark *v.* Cox (32 Mich., 204, 211, and 212).

The courts, in passing upon the question of the wife's necessitous circumstances, invariably refer to the husband's physical and financial ability, his condition in life, as well as the social condition of the parties.

No absolute rule can therefore be laid down which will be applicable alike to all cases, but the fact as to whether the wife is or is not in necessitous circumstances should, in the opinion of the Department, be ascertained and determined according to the evidence in each particular case, applying the well-known rules of law in cases involving the question of necessities. (See Stewart on Marriage and Divorce, par. 180.)

As stated by Justice Cooley in the case of Clark *v.* Cox (*supra*):

To leave out of view the income, or the capacity to earn or produce one, * * * is to omit the most important factor in the problem.

The Department is of the opinion that the foregoing reasoning of Justice Cooley is applicable to this case, and that the financial and necessitous condition of the pensioner should be taken into consideration in determining the actual necessitous condition of the claimant. They are facts which should be considered in connection with other facts in the case.

It is evident from the evidence in this case that claimant was not shown to be in necessitous circumstances, and her claim should have been rejected upon that ground had she filed a valid declaration.

As already stated, however, the only declaration ever filed by claim-

ant was filed July 17, 1899, and was void, and any action based thereon was also void and without authority of law.

The declaration being void, the question of notice in this case becomes immaterial.

The action appealed from is accordingly reversed, and you are directed to cause to be paid to pensioner the one-half pension unlawfully withheld from him, in accordance with the decision in the case of Henry M. Rothery (11 P. D. 255).

MARRIAGE AND DIVORCE—REMARRIAGE—PRESUMPTION OF DEATH—IMPEDIMENT.

MARY N. LESTER (WIDOW).

Appellant's marriage to the soldier at a time when she had a husband living and undivorced, she not having exercised ordinary diligence in informing herself as to the whereabouts of such first husband when she contracted a second marriage, such second marriage was not entered into in good faith, in the honest belief that her first husband was dead, and can not be upheld under section 6, chapter 8, article 1, of the New York Statutes, Vol. 3, and confers on her no right of pension as widow of said second husband.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
May 15, 1902.*

Mary N., as alleged widow of Samuel S. Lester, formerly a private in Company A, Ninety-fourth New York Volunteer Infantry, filed her application under the act of June 27, 1890, on December 3, 1890, claim being rejected on June 4, 1900, on the ground of no title. An appeal was had on July 14, 1900.

The issue in the case is as to the legality of the marriage of soldier and claimant, the facts being as follows:

Claimant states her first husband was Arland R. Marsh, and that he deserted her in the month of April, 1859. Her affidavit reads:

She had been unable to find him or learn what has become of him, and believing him to be dead, she contracted marriage with said Samuel S. Lester.

This marriage was celebrated on July 26, 1865, in the county of Oswego, State of New York, being the same locality in which claimant and Marsh lived when he deserted her. Claimant further says that some years after her marriage with soldier she heard of Marsh's death, but only by rumor. Soldier died on January 17, 1882, the marriage of soldier and claimant took place six years and three months after the desertion, and claimant relies upon the statutory provisions of the State of New York to substantiate the legality of her alleged second marriage, the statute in question being as follows:

If any person, whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living

during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority. (Sec. 6, chap. 8, art. 1, vol. 3, p. 2332, N. Y. R. S.)

It would seem, at first blush, that if the material facts, as narrated by claimant, were corroborated, her case would be established, provided it were shown that claimant did not have at the date of her union with soldier actual knowledge that her first husband was living. The court of appeals of the State of New York have, however, declared in no uncertain terms that there must be something more than passive procedure on the part of the person who contracts a second marriage and relies upon said statute to establish its legality. In the case of *Gall v. Gall* (114 N. Y., 109) the court of appeals said in regard to facts material to be proved under this statute:

He can not shut his eyes and ears and justify a second marriage because for five years he did not hear of his wife. Did he try to hear of her? Did he make inquiries? * * * Was he excused from inquiry by a false report of her death?

And to the same end, the opinion in the case of *Miller v. Dodge* (28 N. Y. Misc., 238) states the statute to be—

Founded upon the basis that marriage brings obligations upon both parties, and that one of these obligations is for each to concern himself or herself as to the whereabouts of the other; and in the case of unexplained absence to make search in the channels of information afforded by relatives or friends. And when, as in this case, the husband is turned out from the home of his wife and forced into prison upon her complaint, however just that complaint may be, she may not rest unconcerned as to his future for the sole purpose of freedom by accruing time; but while she may have exemption from marital subservience on account of brutal conduct, she must exercise proper diligence to entirely free herself from the yoke; to avoid, by the firm belief of death, the having two or more husbands living from none of whom she has been divorced.

The court announced, as the basis of their language, the opinion in *Gall v. Gall*, *supra*.

There is no question, then, but that a claimant who invokes the statute quoted must show she remarried under an honest belief that her first husband was dead, said belief being a reasonable and just conclusion, based upon due diligence in ascertaining facts. Applying this rule to the case under discussion, it is observed that there is evidence by which the question of the good faith of claimant in contracting her second marriage can be satisfactorily answered.

Claimant's sister, who was born in 1833, testified before a special examiner that she lived with claimant in Oswego County, N. Y. About the year 1850 claimant and her husband, Arland R. Marsh, moved to Blackstone, Mass., and affiant went there and lived with them. All three then moved to Fall River, then to Nashua, N. H., and finally claimant and her husband moved back to Oswego County, N. Y., near the old home, and resided there until their separation. In the fall of

1861, two years and a half after the separation, Marsh came to affiant's house and worked for her husband, evidently for some months. Some time after the close of the war affiant met Marsh in Slatersville, R. I., but only long enough to say a few words. She met him again, shortly before he died, in Woonsocket, R. I., and when he died affiant attended his funeral.

The wife of a son of Marsh, by his first wife, testifies that Marsh visited them in the city of Fitchburg, Mass., in 1871, and it seems to be apparent, from the general trend of all the testimony, that Marsh, whose business was that of a mill operator, went back to his old haunts among the mills in eastern New England, and followed his occupation there until his death. His death is a matter of record in the city of Woonsocket, R. I., and occurred on April 24, 1888, six years after the death of soldier.

It is not believed that this claimant exercised even ordinary diligence in informing herself as to the whereabouts of her first husband when she contracted the second marriage. Her own sister, one who had lived with claimant and Marsh for a considerable number of years closely preceding the separation, testifies that Marsh worked for her husband in the fall of 1861, and if claimant had been at all active in prosecuting a search, or had been really desirous of obtaining any knowledge of Marsh's whereabouts, what more natural than for her to communicate with her own sister, who could have informed her that her first husband was living less than four years prior to the attempted second marriage. And, again, why was no information sought for from the son of Marsh by his first wife?

So far as the evidence shows, it tends very pointedly to demonstrate an utter indifference on the part of claimant as to whether or not her first husband was living when she contracted the marriage with the soldier, and to an absolute lack of such diligence on her part as would justify a conclusion that she entered into this second marriage in good faith, in the honest belief that her first husband was dead. In the absence of such an honest belief the appellate courts of the State of New York do not uphold a second marriage under the statute in question.

Action affirmed.

DEATH CAUSE—PATHOLOGICAL SEQUENCE—BACTERIOLOGY—TUBERCULOSIS.

SUSAN CODNER (WIDOW).

The deceased soldier was pensioned at the rate of \$12 per month for "chronic diarrhea and resulting disease of rectum." He died November 12, 1897, of pulmonary tuberculosis, which, his widow contends, was an indirect result of the said diseased condition of his alimentary canal.

Held:

1. That inasmuch as the evidence in favor of the bacterial origin of tuberculosis, whether local or general, is now regarded as conclusive, it is, necessarily, a primary disease, and it is, therefore, never a pathologic sequel of any other disease, though certain constitutional peculiarities, and some local conditions, especially of the bronchii, are considered by medical authorities to be favorable to the invasion, growth, and proliferation of the tubercle bacillus.
2. That the evidence in the case does not establish the existence at any time of tuberculosis of the bowels, though it is not improbable that such conditions did exist during the last few years of the soldier's life as secondary to the phthisis pulmonalis, as such a sequel is not at all unusual.
3. That the said cause of the soldier's death not having been incident in any way to his military service his widow has no title to a pension under the general law.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
May 15, 1902.*

Susan, widow of Egbert Codner, late private, Company B, Third New York Light Artillery, is now a pensioner under the provisions of section 3 of the act of June 27, 1890. Her claim under the said act was filed October 5, 1898.

The soldier died November 12, 1897, and on November 27, 1897, his said widow filed a claim for pension under the general law. This claim was twice rejected on the same ground, namely, that the soldier's death from pulmonary tuberculosis was not due to the chronic diarrhea and resulting disease of rectum for which he was pensioned under the general law at the rate of \$12 per month, and that such cause of death was not otherwise of service origin. The first adverse action in the case was taken June 4, 1898, but the claim was subsequently reopened and the benefit of a special examination relative to the cause or causes of the soldier's death was extended to the claimant. The facts adduced at such examination failed to warrant any change in the former action of the Bureau in the premises, and on September 1, 1899, the claim in question was again rejected.

In an appeal from the second rejection of her said claim, filed November 27, 1899, the appellant contends that—

* * * sufficient weight is not given the testimony of Dr. Osborn and others; and, further, that the soldier did not die of pulmonary consumption.

That the soldier died of pulmonary tuberculosis is, however, shown beyond question by the testimony of his attending physician during his last illness, by the other medical evidence in the case, and by all the material facts presented in the case as well.

According to the deposition of Dr. Osborn, whose testimony is referred to by the appellant, he first treated the soldier several years after the war, about 1873. This affiant further deposed and said, in part:

I have no record showing the date of said treatment; as near as I can recollect, he was under my treatment about two months. He was suffering during that time with chronic diarrhea and piles; and, also, some pain in the back, indicating disease

of kidneys. I don't think I ever tested his urine. There was a sort of hectic fever which I thought was caused from absorption of pus from the diseased intestines. I do not think there were any fistulous openings in the rectum when I began to treat him.

He also had some cough. The cough was not excessive. It was a sort of hacking, irritating cough. During my treatment he seemed to improve, and, at that time, I thought he would make a complete recovery. I did not treat him as long as I wanted to, for the reason that he was poor and when he began to get better he thought he would get well without further treatment. The soldier would have hectic fever during the day followed by night sweats.

The soldier's general prostration indicated that there was a tubercular diathesis. I have never treated him since, but had known him well ever since until he died.

I understood that during the latter part of his life he was troubled with fistulas opening into the rectum. I did not see him in his last illness, but before he was taken down and confined to the house I noticed that he had a bad cough, and he bore a consumptive appearance at the last.

I understand that the soldier's death was caused by pulmonary consumption. If such was the case it would be a natural result of the condition the soldier was in when under my treatment.

The foregoing evidence, which the appellant contends was not given due weight, appears to be rather adverse instead of favorable to her interests in the premises, notwithstanding the said affiant's statement that the fatal phthisis pulmonalis was but "a natural result of the conditions the soldier was in while under my [his] treatment." The "conditions the soldier was in" while under this affiant's treatment, for the space of two months in 1873, were, according to his own statement, that he was suffering from chronic diarrhea and piles, from a hacking, irritating cough, from pain in back, and that he was of a tubercular diathesis. This testimony goes to show that even as far back as 1873 there were premonitory symptoms at least of the fact that the soldier then had the disease of which he subsequently died. And it is worthy of note that there is nothing in the evidence on file even tending to show that prior to the date of his death there was ever any idea that the chronic diarrhea and disease of rectum for which the soldier was pensioned was of a tubercular nature. Subsequent to the date of filing of the widow's claim, however, plenty of testimony has been adduced with a view to showing that such causes of disability were either due to a tubercular lesion of the bowels or that a preexisting morbid condition of the bowels had proved to be fruitful soil for the invasion of the bacillus tuberculosis, and that the pulmonary infection was but secondary to the tubercular process first set up in the digestive organs. But it is not shown by such evidence that any microscopical or bacteriological examination was ever made of any of the tissues or of the secretions or excretions of the alimentary canal, either prior or subsequent to the development of the pulmonary tuberculosis, with a view to ascertaining whether or not the disease of the organs in question was of a tubercular nature. Therefore there is no positive evidence, but only speculation, as to there having been any

intestinal tuberculosis. Furthermore, primary intestinal tuberculosis, though not uncommon in children, is very rare in adults, whereas "secondary involvement of the bowels is very common in chronic pulmonary tuberculosis" (Osler). This same authority also says:

Tuberculosis of the rectum has a special interest in connection with fistula in ano, which, according to Spillman's statistics, occurs in about three-fifths per cent of cases of pulmonary disease. In many instances the lesion has been shown to be tuberculous. It is very rarely primary, but if the tissue on removal contains bacilli and is infective, the lungs are almost invariably found to be involved.

Hence, even though the fistulas which it is stated the soldier suffered from during the last years of his life had been shown to have been tuberculous, it is altogether probable that such condition would have been secondary to the pulmonary tuberculosis instead of being the point of primary infection, as testified to by one affiant.

The attending physician of the soldier during his last illness, Dr. William R. Laird, of Auburn, N. Y., testified as follows:

I have been in the practice of medicine in this city since March, 1880. I became acquainted with Egbert Codner soon after I came to Auburn. I must have known him sixteen or seventeen years before he died. The first record I have of treating him was September 19, 1892, but I had prescribed for him before this. We belonged to the same G. A. R. post. I first treated him for a cough. His breathing was hard and it was of a bronchial character. I never examined him, but from his appearance and his cough I thought there was a solidification of the upper part of both lungs when I first knew him. He had the cough long before I ever treated [him]. He had the general cachexia of consumption. He was flat chested and was stoop shouldered. When he sat in his wagon he always leaned forward with his shoulders drawn together. When he coughed he raised a thick yellow pus. His voice was always husky, showing clearly a diseased condition of the throat and upper part of the lungs. This condition existed when I first knew him, at least fifteen years before he died. I remember of giving him prescriptions for chronic diarrhea when meeting him on the streets and while attending members of his family at his own house, but I have no dates of such prescriptions. I remember also of giving him prescriptions for piles, but I never examined him for piles, and have no dates of the prescriptions. On September 19, 1892, I have record of treating him for a slight hemorrhage of the lungs. I saw him then for five successive days at this time. I treated him again on November 14 and 16 of the same year for the cough and diarrhea. I treated him in 1893, 1894, 1895, 1896, and 1897 for diseased condition of the lungs and diarrhea.

I was called to see him September 28, 1897, and I saw him every day until he died, November 12, 1897. He was having diarrhea, was coughing, and his feet and legs were bloated and became very much distended, and also the abdomen. He was coughing and raising, so much so that he could not sleep, neither could he lie down in bed. He died sitting in his chair. I don't think he was able to lie down in bed for four weeks before he died. The heart was secondarily involved but was not the cause of the bloating. The primary cause was from the malarial influence which induced the diarrhea. There was no organic disease of the heart.

I never examined the soldier's rectum, but he always told me had fistulas in the rectum and that he had to use cotton in the rectum to keep his clothes from soiling. While I never examined the rectum, it is my opinion, based upon the knowledge that soldier had severe chronic diarrhea before he had the lung trouble, that the tubercular condition of the bowels existed before his lungs were affected, and

that the lungs became involved secondary to the diseased condition of the mesentery; that the condition that the rectum was in goes to show also that the bowels were primarily involved. The diarrhea was intermittent all through the last six weeks of his sickness, as is usual in all those cases. Chronic diarrhea was an important factor in the cause of soldier's death. I was not present when he died. I saw him about twelve hours before he died. I was informed that the soldier died sitting in his chair. His death was rather more sudden than I expected. He did not go into a comatose condition but had his senses up to the very last, as I was informed by his family. His cough continued up to the last time I saw him, and he was strong enough to raise the expectoration up to within a few hours before death.

The soldier's death cause was in my opinion from consumption, resulting from a tuberculous condition of the bowels and mesentery, caused by debility resulting from chronic diarrhea. I think that the soldier contracted malaria, which in turn caused the diarrhea and which became chronic, causing a general debility of the whole system. The debility, being so great, served as a ready home for tuberculous condition of the bowels and mesentery, which debilitated the system so much more that we have a softened condition of the lung tissue as a result, with a great amount of expectoration, with cavities forming and in turn affecting the heart's action as a result of the nonoxygenation of the blood, causing the bloating condition of the limbs and abdomen, death resulting.

As will be observed, this affiant says that although he never examined the soldier's rectum it is his opinion that the tuberculous condition of the bowels existed before the lungs were affected, and that the lungs became involved secondarily to the diseased condition of the mesentery. As before stated, however, it has not been shown that, as a matter of fact, the alimentary canal was involved in the tubercular process at all; and, as also heretofore stated, even if it had been it was probably a secondary and not a primary condition. This affiant's theory that the soldier first contracted malaria, which, in turn, caused diarrhea, which became chronic and caused such great debility that the bacilli found "a ready home" in the bowels and mesentery, and that the lungs subsequently became involved, resulting in death, is rather too farfetched to be accepted as sufficient to settle the question at issue in the premises; besides which, it is not in accord with the well-established pathology of the disease under consideration.

Tuberculosis is an infectious disease, caused by a micro-organism—the bacillus tuberculosis of Koch. The evidence in favor of the bacterial origin of tuberculosis being regarded as conclusive, it can not be considered as a sequel of any other disease.

The following-named conditions, however, are believed by recognized medical authorities to favor the growth and multiplication of the bacilli: Heredity, more especially when both parents have the disease; scrofulosis, or the "delicate constitution;" frequently recurring bronchial catarrh, by lowering the vitality of the mucous membrane, thereby lessening tissue resistance to the invasion of the tubercle bacillus; damp localities, by causing greater vulnerability, engendered by the colds and catarrhs which such localities induce; climates that are characterized by frequent, rapid changes of temperature; age, the sus-

ceptible period for pulmonary tuberculosis being between 20 and 35, the mesentric glands being more commonly infected during the first five years of life, including the nursing period and that during which the child is nourished on milk; the shape of the chest, two varieties of which are described as phthysical, the alar and the flat; and, finally, traumatism, which favors the lodgment of the bacillus, more particularly seen in the development of tuberculosis of the joints succeeding injury. (Tyson.)

As to the first of the conditions, namely, "heredity," Dr. Osborn, whose deposition has been quite fully set out herein, said in a prior affidavit: "He is of a consumptive family; he has always borne a consumptive appearance." And as to another condition, "the shape of the chest," it is shown by an abundance of testimony that the soldier was flat or hollow chested. His widow says in her deposition:

My late husband was, from the time I first knew him, stoop shouldered and never stood erect. When driving on his wagon he always rested his elbows on his knees, thus always sitting in a stooping posture.

Relative to the chronic diarrhea for which the soldier was pensioned, it is noted that he was subjected to three official medical examinations during the prosecution of his claim for original pension and for increase in the rate thereof, the first of which was made in 1881 and the last in 1891. At each of these said three examinations his weight was the same, 135 pounds, which was a fair weight for his height, 5 feet 7 inches, and its uniformity shows that the diarrhea was not of an exhaustive nature. At the second examination, in 1889, he stated to the examining surgeon that he was "habitually constipated" unless he used a laxative, but had "some diarrhea in summer." Had there been a tubercular lesion of the bowels at that time, however, no such history of the case would have been given.

As to the method of infection in pulmonary tuberculosis (*phthisis pulmonalis*) Tyson says:

There are two possible routes of invasion of the lungs—one by the air passages (*inhalation tuberculosis*), the other by the blood. The former is by far the most common for ordinary forms of consumption, while the latter produces, usually, *miliary tuberculosis*.

From the facts presented in this case, as herein set out, it seems quite probable that the soldier had a hereditary tendency to *phthisis pulmonalis*, and it is clearly shown that he had what is known as the "phthysical chest;" and it is altogether probable that he proved to be an easy victim of what Tyson calls "*inhalation tuberculosis*." And the diarrhea, which certain witnesses in the case try to show was such an important factor in causing the soldier's death, was, in all probability, but one of the symptoms that occur in later stages of consumption, and was due to a secondary, instead of to a primary, tuberculosis of the bowel, although, as Tyson says, "Not every diarrhea, however, in tuberculosis is tubercular."

In view of what has been stated herein, the Department feels impelled to hold that the appellant's claim for pension under the general law is without merit. The action appealed from is, therefore, hereby affirmed.

MARRIAGE AND DIVORCE—IMPEDIMENT—EVIDENCE—PRESUMPTION.

ELIZABETH SCHNEIDER (WIDOW).

Appellant was married to the soldier in accordance with the law of Ohio in 1886, and lived with him in the State of Michigan as his wife until his death in 1895. One witness has testified that soldier was previously married to a woman in 1865, who left him in 1871, and had not since been heard of. A special examination failed to find any trace of said alleged prior wife.

Held, That the mere presumption of life is not sufficient to overcome those presumptions which surround the celebration of a marriage, and under the facts as disclosed claimant is recognized as the widow of soldier.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
May 19, 1902.*

Elizabeth Schneider, as widow of Fritz Schneider, formerly private, Company K, Fifteenth Michigan Volunteer Infantry, filed a claim for pension under the act of June 27, 1890, January 19, 1895, which was rejected January 13, 1900, in the following stated language:

Approved for rejection on the ground of claimant's inability, though aided by a thorough special examination, to prove death or divorce of soldier's former wife, and hence that she is his widow.

February 3, 1900, the claimant filed an appeal to the Department, alleging that the Bureau was in error in its conclusions from the evidence in the case and the law applicable thereto.

The claimant was married to the soldier by ceremony in conformity to the laws of the State of Ohio on September 7, 1886, and lived with him until his death on January 11, 1895, two children having been born of the union, and who are now living with the claimant. The evidence shows that in 1880 or 1881 the soldier was married to another woman who died in 1884. It is also shown by record evidence that the soldier married another woman October 22, 1865, in the State of Michigan by a lawful ceremony. The exact date when this wife left the soldier does not appear from the evidence, but it was probably in 1871 or 1872. There is direct conflict in the evidence regarding the circumstances of this woman's leaving the soldier. Three witnesses testify that this first wife and two children were compelled to leave him because of his cruel and inhuman treatment of her. A number of other witnesses, of equal credibility with those just mentioned, testify that the soldier's first wife was a woman of loose and immoral habits, and left him in the company of another man. It is agreed by all the witnesses that from the time of her disappearance in 1871

or 1872 she has never been heard of by anyone who would have been likely to have heard of her. Some of the witnesses said she went to Erie, Pa., and some said she went to Monroe, Mich. Thorough special examination has failed to disclose any tidings of her at either place. In short, so far as the record shows, she simply disappeared, and has never been heard from. It would appear that the circumstances under which this woman left the husband is immaterial for the purpose of this inquiry. It is enough to know (and this the evidence clearly establishes) that she left him for a period of fourteen years before the marriage in issue.

The marriage in this case was contracted in the State of Ohio and the right to pension accrued in the State of Michigan. Under the act of August 7, 1882, the validity of the marriage may be tested by the law of either State. As it happens there is no essential difference between the holdings of the courts of said States in cases similar to the one under consideration, there will be no difficulty in deciding the question. The point of law here presented is an exceedingly simple one, and upon which there is no contrariety of opinion among the courts of the various States of the Union.

The marriage in issue on its face was valid. It was regularly entered into and the parties lived together as man and wife for a period of nine years, and were known as man and wife in the communities where they resided, and, so far as the record discloses, no one ever called such marriage into question until after claim for pension was filed. It was then shown that the soldier had been married in 1865, and no positive proof of the death or divorce of the wife by that marriage could be furnished by claimant or secured on special examination.

In the case of *Dixon v. The People* (18 Mich., 84) the supreme court of Michigan said:

The presumption of innocence—that she would not commit the crime of bigamy by marrying the defendant while Phillips was alive—rendered it obligatory on the court, in the absence of testimony to the contrary, to conclusively presume the death of Phillips and the validity of her marriage to the defendant.

See also *Rice v. Lumley* (10 Ohio St., 596) and *Rosenthal v. Mayhugh* (33 Ohio St., 155), cited in the case of *Elizabeth Adams* (12 P. D., 312).

It is to be noted in this case that the soldier married two women after his first wife left him—one in 1880 and the other in 1886. In the absence of evidence to the contrary both of these marriages are to be presumed lawful. It is shown that the marriage entered into in 1880 was dissolved by the death of the wife, and the validity of the marriage in issue is questioned by the fact that in 1865 one of the parties was married, and there is no proof that said marriage was dissolved by death or divorce prior to 1886. There is here a conflict of presumptions, one of the validity of the marriage contract and the other

the presumption that the wife of the first marriage was living at the date the marriage in issue was consummated.

In the case of *Jennette Burton* (9 P. D., 31) it was held:

The burden of proof against the validity of the ceremonial marriage does not rest upon the widow, but upon the parties who attack the validity of such ceremonial marriage, and the presumption of law favors innocence of the latter marriage until the contrary be proved.

In the case of *Gaines v. New Orleans* (6 Wall., 642) the Supreme Court of the United States held:

The fact of marriage being proved, the presumptions of law are all in favor of good faith. To disprove good faith in such case there should be full proof to the contrary, and it must be irrefragable.

In the case of *Lockhart v. White* (18 Tex., 102) the rule of law in this class of cases is succinctly stated, as follows:

Though the law presumes a continuance of life, yet when this presumption necessarily involves a presumption of crime and comes in conflict with the presumption of innocence, the former, which is the weaker, yields to the latter, and the party affirming that an individual is not dead will be bound to prove it.

In the case of *Esther A. Palmer* (11 P. D., 320) the Department said:

The mere presumption of life is not sufficient to overcome those presumptions which surround the celebration of a marriage, and this by the vastly greater weight of authority in this country.

See case of *Annie Notman* (11 P. D., 212).

In the case of *Margarette E. Harnden* (12 P. D., 278) the question of presumption of death in favor of the validity of a marriage is exhaustively discussed with citations of a large number of authorities.

In this case the special examination was conducted in 1898 and 1900, twenty-six and twenty-eight years after the disappearance of soldier's first wife, and no trace of her was discovered. While it is true that if the soldier drove her away by inhuman conduct, or if she left him to accept and live with another man, that her absence is accounted for, still there are other elements entering into the case from which her death may be presumed in 1886, when the marriage in issue was consummated, and this because to hold otherwise would be to rob one of the strongest presumptions known to the law (that of innocence) of its force and effect.

In this regard Mr. Bishop, in the first volume of work on Marriage, Divorce, and Separation, paragraph 951, says:

If, while this presumption of the continued life of an absent party to a marriage remains, the other enters in a second marriage, the presumption of the innocence of such marriage operates as a counter presumption of death. Should it be urged that in natural reason the marriage does not render the death more probable, the reply is that actual belief and presumption are not necessarily identical, yet truly the marriage is an added ground for inferring death. For right-minded men and women, as all are assumed to be, will not knowingly commit polygamy.

In the case under consideration the claimant has established marriage to the soldier in 1886, by the law of Ohio, and she lived with him as his wife until his death in 1895, and bore him two children. Up to 1895 the validity of the marriage was not questioned, until one affiant stated the soldier had been married in 1865, and the wife of that marriage left him in 1871 or 1872, and has never been heard from since. The special examination was then conducted, and because proof was not secured showing that the first wife was dead or divorced in 1886, when the marriage in issue was entered into, the claimant was denied a pension. This is not the law. The Department has repeatedly held it to be the law that in absence of proof to the contrary a marriage solemnized in accordance with due forms of law is presumed to be valid.

See Jennette Burton (9 P. D., 31); Louisa C. Germain (11 P. D., 66); Nora O'Brien (12 P. D., 32); Esther A. Palmer (11 P. D., 320).

Therefore, under the facts as disclosed by the evidence in this case, it is clear the claimant would be recognized as the widow of the soldier in Ohio and Michigan, and as such widow is entitled to pension, if the other requirements of title are established.

The action of the Bureau from which appeal was filed is reversed.

SERVICE—CIVILIANS—SUBSTITUTE.

FRED PAIN, ALIAS HENRY FOREMAN.

The legal status of a man who becomes a voluntary substitute for a soldier and serves and is discharged in the name of the soldier is that of a civilian, he having never enlisted or been mustered into the military service of the United States. John S. Williams (10 P. D., 169).

A civilian who served in the Army or Navy has no pensionable status under section 2 of the act of June 27, 1890, or May 9, 1900. John Laughlin (9 P. D., 466).

The words "all persons" in said section 2 are limited by the context to those persons "who served ninety days or more in the military or naval service of the United States," and do not include a person who served in the capacity of a civilian or nonenlisted person. (John H. Meeker, 10 P. D., 182.)

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
May 26, 1902.*

Fred Pain, alias Henry Foreman, appealed October 4, 1901, from the Bureau action of August 10, 1901, rejecting his invalid claim No. 601757, filed May 5, 1897, under the second section of the act of June 27, 1890, as amended by the act of May 9, 1900, on the ground that he was never mustered into the United States military service, he having simply stepped into the ranks and answered to the name of one Henry Foreman, private in Company D, Ninety-seventh United States Colored Infantry, who had left the command, as shown by the evidence on file.

Claimant contends that he was mustered in by Colonel Robertson, and being permitted by the officers of his company to take the place of Henry Foreman, and having actually served more than ninety days, his service complies with all the conditions of section 2 of the act of June 27, 1890; that he served under the name of Henry Foreman and was discharged under that name, which fact does not forfeit his right.

The records of the War Department show that Henry Foreman, also borne on the rolls as Henry Forman and Henry Farman, was born in Virginia, 21 years of age, a laborer, hair, eyes, and complexion black, height 5 feet 7 inches, was enrolled April 20, 1865, at Mobile, Ala., as a private in Company D, Ninety-seventh Regiment United States Colored Troops, to serve for three years, and was mustered out of service with the company April 6, 1866, at Mobile, Ala. The records do not show that he incurred or was treated for any disability during service.

Two colored men are applicants for pension based upon said service. The first applicant, Henry Foreman, of Vicksburg, Miss., filed his first application July 17, 1890, in which he alleged that he was enrolled March 4, 1865, in said company and regiment and was honorably discharged at Mobile, Ala., in 1865. His claim was rejected by Bureau action of August 8, 1901, on the ground that he was never discharged from the military service, the discharge certificate having been given to one Fred Pain, who took claimant's place in the ranks and answered to his name until the discharge of the command. No appeal has been taken by the claimant from said action.

The second claimant is the appellant herein, who filed his first application May 5, 1897, under the act of June 27, 1890, in which he alleged that he was the identical Henry Foreman who was enrolled April, 1865, in said company and regiment and was honorably discharged with his command April 6, 1866. He gives his residence as Lusk, Choctaw County, Ala. His said claim was rejected by the Bureau of Pensions on the ground and at the date heretofore stated, from which action he has appealed.

Both claims were specially examined. The Mississippi claimant was reported by the examiner as being of good reputation, and the Alabama claimant, the appellant, as "unreliable." Both are ex-slaves, and both sign by mark, and have no accurate knowledge as to dates.

The Mississippi claimant testified before the special examiner December 27, 1899; that he was the identical Henry Foreman who enlisted in Company B, Eighty-sixth United States Colored Volunteer Infantry, at Mobile, Ala., about September, 1865, and was mustered in about October, 1865, and was transferred to Company D, Ninety-seventh United States Colored Volunteer Infantry, some two or three weeks afterwards, and was discharged at Mobile by the captain of his company under the following circumstances: Was taken sick at Mobile in

the latter part of the summer after President Lincoln was shot; that Captain Melvin came to him in hospital and informed him that he could not get a discharge for him, but that there was another man who would like to take his place if he (soldier) was willing, and that his rank or service would not be changed; that the other man came with the captain, and it was understood that he should stand in his (soldier's) place, and under this arrangement he left the service, being very sick at the time, about September or October, 1865; that he did not know the name of the man who took his place; that he never saw him before and had not seen him since; that he (soldier) was born in Virginia, and belonged to a man named Cremps, but enlisted under the name of Henry Foreman, because that was the name given him by his mother; that he turned all his accouterments over to the man who took his place; that he never drew a cent while in the service, and never received any bounty, and supposed the "other fellow drew it."

The Alabama claimant, Fred Pain, alias Henry Foreman, testified before the special examiner May 14, 1900, that he served under the name of Henry Foreman in Company D, Ninety-seventh United States Colored Infantry; that he was enlisted at the dry dock, in Mobile, Ala., in April, 1865, and was mustered out in June of the following year; that he did not enlist as a substitute for another man and that there was no other man by the name of Henry Foreman in the company; that he did not take another man's name when he enlisted.

When asked why he took the name of Henry Foreman when he enlisted, he replied:

Because I was afraid my white folks would kill me if they should know I had been in the Union Army. I never knew a man by the name of Henry Foreman; I just picked it up. * * * Our captain's name was Melvin. When I was sworn in by Captain Melvin and Colonel Robinson, Captain Melvin told me to take the name of Henry Foreman. I do not know why he told me to take that name. I did not know that I was taking the name of another man. I was born in Sumter County, Ala., and my parents belonged to Mr. Hutchins. I was sold to Netherly and taken to Mississippi, where I remained until Mobile surrendered. Then I was free and went to Mobile and enlisted. I was examined by several doctors before I was sworn in. * * * When I was mustered in at Colonel Robinson's office door, Colonel Robinson and Captain Melvin said to me, "Now you must go by the name of Henry Foreman." They told me to go to Wallace Cormis's tent and get a gun and equipments which I would find there. I went to the tent, as ordered, where I found the gun and equipments. Wallace Cormis said to me, "These things belonged to Henry Foreman." That was the first I knew about Henry Foreman. I did not see him. He had gone before I got to the tent. Yes, sir; I did understand there had been a man by that name in the company, and I understood that I was taking his place, but I did not want to take his name, but I could not help myself. I took this man's tent and bunk. I did not make this statement in the first place. I was afraid it would hurt my claim.

It is evident from the foregoing that but little reliance can be placed upon the testimony of the Alabama claimant; but assuming that he is

the man who took the place of the Mississippi claimant in the service, it would appear that he was substituted in the place of an enlisted man, answered to his name, and received a discharge in his name; that he was but a voluntary substitute for the soldier.

Aside from claimant's testimony, there is no evidence that he ever entered into a contract of enlistment or was ever mustered into the service. He could not have been arrested or punished for desertion and could not have been held in the service against his will and consent. He never ceased to be a civilian.

The legal status of a man who becomes a voluntary substitute for a soldier, and serves and is discharged in the name of the soldier, is that of a civilian, he having never enlisted or been mustered into the military service of the United States. John S. Williams (10 P. D., 169).

A civilian who served in the Army or Navy has no pensionable status under section 2 of the act of June 27, 1890, or May 9, 1900. John Laughlin (9 P. D., 466).

The words "all persons" in said section 2 are limited by the context to those persons "who served ninety days or more in the military or naval service of the United States," and do not include a person who served in the capacity of a civilian or nonenlisted person. John H. Meeker (10 P. D., 182).

As claimant has failed to prove his enlistment he is not entitled to a pension, and the action appealed from is affirmed.

DEATH CAUSE—PATHOLOGICAL SEQUENCE—GANGRENE—ULCERATIONS.

EMILY JUNO (WIDOW).

The soldier was pensioned for disease of the left leg, which was characterized by swelling, eczematous eruptions, and, at times, ulceration. He died from gangrene of this leg, complicated by disease of kidneys.

It is held that the pensioned disability can not be ignored as a predisposing cause of the fatal gangrene of the left leg. Whatever may have been the exciting cause, the fact remains that this chronically diseased leg became gangrenous and caused the soldier's death.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
May 27, 1902.*

Under date of February 15, 1902, the papers in the appealed claim of Emily Juno, widow of Andrew Juno, late a private in Company I, First Michigan Volunteer Infantry, were returned to the Pension Bureau for special examination, readjudication, and a further report.

The papers were again transmitted to the Department with the statement that the action appealed from should be adhered to, and attention is invited to the following opinion of the medical referee, dated May 10, 1902:

The S. E. report filed April 4, 1902, has been carefully considered in connection with the other papers on file in this case.

It does not, in my opinion, warrant the admission of the old-law widow's claim. It is not satisfactorily shown that the pensioned disability was a factor in causing the soldier's death. The claim was readjudicated, on the face of the widow's brief, under date of April 9, 1902.

The Department's former communication contained a synopsis of the material facts, together with the reasons for the special examination, as follows:

The soldier enlisted July 27, 1861, in the aforesaid organization; he was transferred to the Veteran Reserve Corps October 19, 1863, and honorably discharged August 5, 1864. The records show that he was treated at different times from October 28, 1861, for various affections.

In his original declaration for pension, filed in 1879, the soldier alleged that on October 15, 1861, he had contracted typhoid fever, from the effects of which he still suffered; also rheumatism, from which he had never recovered. After a special examination the claim was approved for disease of the left leg. This approval appears to have been made in 1887 in accordance with an opinion from the medical referee, but said opinion is not found with the papers. The soldier was pensioned for disease of left leg from the date of his discharge, having received \$2 from said date; \$6 from April 30, 1890; \$10 from September 9, 1891, and \$17 from April 15, 1896. During a part of said period the soldier received the maximum rating under the act of June 27, 1890.

At the time of his death, which occurred August 30, 1899, the soldier had pending a claim for disease of eyes, alleged as an additional disability of service origin. Said claim was subsequently rejected.

The soldier was examined in connection with this claim on August 16, 1899, two weeks before his death. The report of said examination showed the condition of the left leg as follows:

"Claimant has eczema of left leg from knee to instep, encircling whole leg, and scar on inner surface of leg just above knee joint, 2 inches in diameter, from same cause. In our opinion the result of venous stasis from typhoid fever. Left leg at calf, 17 inches; ankle, 13½ inches. Right leg at calf, 14½ inches; ankle, 9½ inches. Ecchymosed appearance of entire surface (of left leg)."

The board further described beginning senile cataract in each eye and reported that the urine contained 50 per cent by volume of albumin.

Dr. J. M. Lower certified in an affidavit filed February 13, 1900, that he had attended the soldier more or less during nine or ten years, mostly for varicose ulcers of the leg; that during his last illness the soldier was confined to bed about two weeks; that he died August 30, 1899, from blood poison from ulcers on his leg.

As this statement appeared to conflict with the report of the official examination, a further statement from Dr. Lower was secured by a special examination on July 19, 1900. He then stated in his deposition:

"I treated him more or less from the time I first knew him for an ulcerated leg. Both legs were affected more or less, but only one was seriously affected. I forget which it was. He had what are called varicose ulcers. * * * I have no record of my treatment of him. I don't remember the number of days he was down in his last sickness. The immediate cause of his death was blood poisoning resulting from these ulcers. I visited him every day and sometimes two or three times a day in his last sickness. The circumstances were these: He was feeling fairly good and went over to Wausau, before the pension board, and exerted himself considerably in running over town. He came home feeling badly and was taken down to his bed. He was hardly able at any time to take a trip like that, but he was energetic and would do it. I think he was taken down in bed as soon as he returned from Wausau. I was called right away. He was feverish and chilly when I was first

called, as his leg was paining him and swelling up rapidly. He had pains through his body generally and got delirious. He was more or less delirious during the whole time of his last illness. The swelling extended up as far as the hip. The ulcers were open when I was first called. His leg was almost honeycombed with them, some large and some small. The worst ones, I believe, were below the knee in his last sickness, but a few years ago he had a very large one above the knee. These ulcers were open more or less all the time. His leg turned black. * * * He had been complaining of kidney and liver trouble more or less all of the time I knew him, and those troubles became exaggerated in his last sickness. His urine got very scant. The blood poison was the cause of death independent of the kidney or liver trouble. The kidney trouble became exaggerated from the feverish condition that he was in from blood poison. He was troubled with albuminuria and his liver was simply torpid at times. * * * I was not there when he died. Well, he was dying for three or four days. * * * The kidney and liver trouble cut no figure in the cause of his death. * * * The leg turning black in his last sickness was from gangrene setting in. * * * The gangrene extended in spots all over the leg, especially below the knee, and it extended above the knee, too, before he died."

In commenting upon the testimony the medical referee states as follows under date of January 23, 1902:

"If the testimony of the attending physician, Dr. Lower, should be accepted in its entirety, it would necessitate the ignoring of the reports of the examining surgeons in the case. The condition of the left leg shown in 1881, when first examined, was pretty much the same as when last examined in 1899 and at the intermediate examinations. The soldier was examined seven times during that period, and no ulcerations of the leg were described. * * *

"The facts as they appear from a medical standpoint are: That the soldier had nephritis and that his urine contained 50 per cent by volume of albumin when he was examined by the board at Wausau, Wis.; that on his return home from that examination he became rapidly worse from the kidney disease and died from the effect of that disease. From the fever and debility consequent on the kidney disease, pain and swelling may have increased in the diseased leg, but the general history of the case does not show that blood-poisoning—septicæmia—was present.

"The general symptoms present in the soldier's fatal illness and described by the attending physician are consonant with the diagnosis of nephritis made by the board at Wausau, and the history of the soldier's case warrants the medical approval on the brief face of the widow's claim, viz, that his death was due to disease of the kidneys, not a result of the disease of the right leg."

It thus appears that the medical referee has taken an entirely different view of the case from that of the attending physician, and both have ignored the apparent fact that acute gangrene of the leg was the actual determining cause of death. If sepsis supervened it was evidently due to or a part of the gangrenous process. The testimony of Dr. Lower does not indicate that the soldier's death was due to disease of kidneys, nor does it appear that the conclusions of the medical referee are warranted.

In this view of the case, and by reason of the existing discrepancy between the report of the examining surgeons and the testimony of the attending physician, the Department remands the claim for a thorough special examination to determine all the facts relating to the soldier's fatal illness and his condition during the last three years of his life. * * *

When interviewed by the special examiner in March, 1902, the claimant (widow) stated, in part, as follows:

The soldier had that diseased limb when we were first married (1880) and it kept getting worse right along. He went to Wausau on Wednesday, August 16, to be

examined. He came home that evening. Thursday he went up to his candy and peanut stand and was there Friday before noon. He came home to dinner, Friday, feeling bad and did not go uptown any more. He was in such pain that he could not rest anywhere. He would lie down on the lounge, on the floor, or anywhere he could rest himself. He did not lie long anywhere. The pain and misery all seemed to be in that one limb. I could not tell whether or not there were any ulcers on his limb when he went to Wausau. His limb was swollen clear up to his hip. I had to rip his pants leg open clear up.

About two weeks before he went to be examined at Wausau there were red streaks started on each side of his ankle, and those streaks kept working up, and after he went to bed they worked clear up to his hip. Those streaks were very painful when they first started and he used to sit and rub them.

The limb gave such an odor that I had to use carbolic acid to kill it while he was in bed. Before he went to bed this leg swelled one afternoon until I had to rip his drawer and pant leg. I don't know of any other chronic ailment that he complained of more than his limb used to pain so, and he complained of the left side of his back from that pain.

I don't know as he ever complained of his kidneys any more than he would say his back ached sometimes. He had no trouble from his kidneys in his last sickness, that I know of. I waited on him all through his sickness. His other leg, the right one, was not affected in any way more than it would get tired from favoring the left one. * * * He never got hurt in any way. He never had a scratch or bruise on that limb after we were married.

He was taken on Friday, and I think it was Monday or Tuesday following that I got him in bed, and he never got out of it after that. He had to lie on his back all the time. He could not raise his limbs. All he could move was his arms. For probably four or five days before he died he would be in a kind of stupor a good deal of the time. When wakened up he would probably speak a few words, then go to sleep again. He turned yellow all over three or four days before he died. * * *

I called Dr. Lower either on Friday night or Saturday morning. * * * The limb was very hot and feverish in the last sickness. * * *

Zephaniah Hammond deposed, in part, as follows:

I knew him (the soldier) well from my first acquaintance up to his death. I visited him during his last sickness. I sat up a number of nights with him. I was there when he died. * * *

His left leg was black almost up to his body and there were blisters on his leg and side of hip. The leg smelled awful bad. It scented the whole room and they had to keep stuff there to keep the scent down. Some of the blisters on his leg stuck out a half inch in the center. The leg was swollen badly and had been for quite a while before he was taken down. There was running sore on his leg, I think a little above the knee. He was in bed when I first called to see him in his last sickness. He could not move himself in any shape. * * * He was able to talk to me when I first went there in his last sickness, but he got so he could not talk at all. * * * He did not know anything, I think, for forty-eight hours before he died. At the last he trembled all over. At his last gasp there was black looking stuff ran out of his mouth that smelled awful.

This testimony as to the soldier's symptoms and the condition of the left leg during the fatal illness is corroborated in the main by the testimony of George W. Bemis, Joel E. Parker, and N. E. Preston, the undertaker who buried the soldier's body. It appears the soldier was of good habits, and the affiants had no definite knowledge that he suffered from disease of kidneys at any time.

The three physicians who constituted the board that made the last examination of the soldier were unable to add any material information to their report in the case. Their recollections of the soldier or the circumstances attending his examination were vague and indefinite.

Dr. Lower stated in his deposition on March 25, 1902, in part, as follows:

I have no record of my treatment of him at all. At first I kept a record but it was destroyed by fire and after that I did not keep a record. I treated him more or less for kidney and liver trouble at different times, but I could not say when I first treated him for those troubles. It was such as old men get sometimes who are wrecks. The only symptoms I recall now are, his kidneys were not active sometimes and he had torpid liver. * * * The trouble commenced with rigor, fever, and delirium. He kept getting gradually weaker and his leg was turning sore and black—becoming gangrenous. That was his bad leg. I could not recall, for sure, that he ever had an ulcer on the other leg. The ulcers were open in his last sickness. They would come and go, that is, they would get better then break out again. * * * I could not say how soon I noticed that his leg was becoming gangrenous but it was pretty early in his last sickness. I could not tell what the cause of the gangrene was, but any kind of a sore is liable to result in gangrene, especially in elderly people. I think that both the arteries and veins were obstructed on account of the swelling of the leg. There was no evidence of atheroma or arterial degeneration elsewhere that I knew of. * * * I made no chemical examination of his urine. It was scant and heavily loaded, from appearances. His death was directly due to blood poisoning resulting from that leg. I never noticed or considered that his kidney disease was very serious. * * *

It is observed that the claim was recently rejected on the same ground as before—on the ground that the soldier's death "resulted from disease of kidneys not due to cause which has been legally accepted," yet the medical referee states that "it is not satisfactorily shown that the pensioned disability was a factor in causing the soldier's death," as though not fully indorsing that action in the light of all the evidence. The Department can not agree with the conclusion that disease of kidneys was the cause of the soldier's death, for it is not sustained by the evidence and the history of the case, especially during the fatal illness. Disease of kidneys was a complication, no doubt, but it is quite evident that gangrene was the immediate cause of death.

There is no positive evidence that the soldier suffered from disease of kidneys for any considerable period prior to his death. The official report in 1890 stated that there was "nothing to indicate renal disease." Nothing abnormal about the urinary organs was shown in 1891. In 1896 the examining surgeon stated—

I find no disease of kidneys, at least examination of urine is negative; but no doubt trouble of back is rheumatic.

The last report, in 1899, showed 50 per cent by volume of albumin in the urine, and the board stated that in their opinion the soldier had a chronic form of interstitial nephritis and albuminuria as a result; the urine was acid and its specific gravity 1018.

Chronic interstitial nephritis is frequently not indicated by distinctive

symptoms until those of uræmia mark the beginning of the end; the specific gravity of the urine is generally low; the amount of albumin is small, seldom exceeding one-tenth the volume of the fluid tested; and hypertrophy of the left ventricle of the heart is almost an invariable symptom in this disease. In this case the characteristic symptoms of uræmia were not described at any time, the specific gravity was nearly normal, the amount of albumin was 50 per cent by volume, and no hypertrophy of the heart was shown. From these data it would appear that the diagnosis of chronic interstitial nephritis was incorrect.

Dr. Lower stated in his last deposition that the kidney and liver troubles for which he had treated the soldier were such as old men get sometimes; that the kidneys were not active sometimes; that he made no chemical examination of the urine, which was scant and heavily loaded, from appearances; that he never noticed or considered that the disease of kidneys was very serious. In his earlier deposition, however, he stated that he "simply analyzed his urine for the albumin in his last sickness;" but he did not state the amount nor give any further information. The special examiner states that Dr. Lower bears a good reputation and that he "appeared perfectly frank and honest in giving his statement." All the other affiants are reported as of good reputation.

It appears that the soldier incurred the disease of the left leg while in service as a sequel of typhoid fever. The affection was described in 1881, at the time of the first examination, as a "varicose condition of the veins of the leg and foot with a large eczematous patch with purple base and surrounding œdema," which the examining surgeon stated was the alleged or "supposed rheumatism." The reports in 1890 and 1891 showed numerous scars from rupture of veins and ulceration and marked enlargement of the left leg. In 1896 the examining surgeon stated that the left leg might as well have been amputated so far as its usefulness was concerned; that from the foot to the knee it was enlarged, indurated, and discolored, with an eczematous eruption over a portion of it, having the appearance of elephantiasis. The condition in 1899, two weeks before death, is set forth above.

Although open ulceration of the leg was not described in any of the official reports, as stated by the medical referee, the later reports show that scars existed from such ulceration, and the evidence establishes the fact that ulceration occurred at different times. All of the reports showed eczematous eruptions, generally severe. These reports, therefore, sustain the testimony of Dr. Lower to a certain extent, and they need not be held as invalidated thereby. Moreover, the claim does not now rest alone upon the testimony of Dr. Lower. All the evidence now indicates that the soldier's death was directly due to the condition of the left leg.

From the statement of the widow it appears that the trouble was

aggravated or that a local infection occurred on the left leg about two weeks before the soldier went to Wausau to be examined. She describes painful streaks on each side of the ankle, which kept working upward. The report of the board showed eczema encircling the left leg from the knee to the instep, the entire surface being "ecchymosed," and comparative measurements showed this leg $2\frac{1}{2}$ inches larger at the calf and $4\frac{1}{2}$ inches larger at the ankle than its mate. About two days after this examination the leg again became painful and swelled rapidly, and it was about this time the doctor was called; but it was not until three or four days after this that the soldier took to his bed, and he died about a week thereafter.

The symptoms manifested during the fatal illness point to the disease of the leg and the gangrene which ensued therein as the actual causes leading to the death of the soldier, although disease of kidneys may have been a complication, as stated above.

The mere fact that the soldier's urine was found to contain 50 per cent of albumin by volume two weeks before his death is not sufficient to warrant the conclusion that disease of kidneys was the cause thereof, yet this appears to be the basis of the action. The presumption of the medical referee that disease of the kidneys was the cause of death is not sustained by the testimony. The same large amount of albumin was found in 1898 in the case of another pensioner, who filed an appeal a year thereafter, and he was apparently still alive when his appeal was recently considered by the Department. (Case of James L. Hammack, Docket No. 59887.)

Large amounts of albumin are found in some forms of kidney disease, but this is not the element of special danger. The danger in all affections of the kidneys is from failure to eliminate some of the ordinary constituents of the urine, which gives rise to uræmia. As stated above, the characteristic symptoms of uræmia were not described in this case at any time. The marked prostration, delirium, stupor, etc., during the fatal illness appear to have been symptomatic of the gangrene rather than indicative of possible uræmia. Moreover, it is not impossible that the affection of the kidneys may be traced to the disease of the leg itself; but this feature of the case will not be discussed, as it appears unnecessary.

From this careful review of the evidence it is clear that the pensioned disability can not be ignored as a predisposing cause of the fatal gangrene of the left leg, and no other considerable cause has been shown. The leg had been in a diseased condition for many years, and, whatever may have been the exciting cause, whether it was merely the exertion from "running over town" the day he was examined or something apparently less trivial, the fact remains that this chronically diseased leg became gangrenous and caused the soldier's death. In the opinion of the Department the fatal disease, gangrene of the left

leg, should be accepted as resulting from the pensioned disability, complicated by disease of kidneys.

The action rejecting the claim is therefore reversed, and you are directed to readjudicate the claim in accordance with this view of the case.

DEPENDENT RELATIVES—MEANS OF SUPPORT—EVIDENCE.

HIRAM COLLINS (FATHER).

The evidence showing that the applicant is adequately supported from the proceeds of his farm and the contributions of those legally bound to support him, under the laws of Michigan, he is not dependent within the meaning of section 1 of the act of June 27, 1890.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
May 28, 1902.*

On June 14, 1895, Hiram Collins, as dependent father of George W. Collins, formerly private, Company C, Thirteenth Michigan Volunteer Infantry, filed a claim for restoration to the rolls under the act of June 27, 1890, which was rejected October 31, 1899, in the following stated language:

Approved for rejection of claim for restoration on the ground that the claimant's financial condition and the agreement under which his son, James C., was to provide for his support during his lifetime do not appear to have changed since the date of dropping.

January 23, 1900, the claimant, by his attorney, filed an appeal to the Department, alleging that the Bureau was in error in its consideration of the evidence in the case and the law applicable thereto.

The record discloses that on August 27, 1892, the claimant was allowed \$12 per month under said act, to commence April 13, 1891, which he drew until August 4, 1894, when his name was dropped from the rolls for the following stated reasons:

Approved for dropping on the ground that the pensioner is not dependent within the meaning of the act of June 27, 1890. A special examination has shown that one James C. Collins is bound by contract for his support.

The evidence filed in the claim for restoration is sought to establish that there is no legal contract between the claimant and his son, James C., providing for the former's support, and that the 80 acres of land owned by him does not and can not be made to furnish an "adequate" support.

A dependent father within the meaning of the act of June 27, 1890, is one who after showing the death of the soldier in the service or from service causes under the limitations that would have entitled

the said soldier to pension under the general law, and the death of the soldier's mother, has no adequate means of support, counting the proceeds of his own daily labor and the contributions of those legally bound to furnish him support.

See section 4707, Revised Statutes; also case of James A. Hayes (7 P. D., 190); also the first section of the act of June 27, 1890.

In the case under consideration the first inquiry should be directed to ascertaining whether James C. Collins is legally bound to support his father, the claimant, by contract.

In 1883, it is shown by the evidence, the claimant herein drew up in form a warranty deed to 80 acres of land, which in terms conveyed said land to James C. Collins, subject, however, to a life interest in the grantor and his wife, the consideration being expressed as follows:

And the party of the first part does hereby hire the said premises for the term as above mentioned, and doth covenant and promise to pay to the party of the first part, his representatives and assigns, the lands and premises hereby leased and this day conveyed to said first party, which is hereby deemed a consideration for the full, complete, and perfect support and maintenance of said second parties for the term of their natural lives, including tea, coffee, tobacco, and money for travel.

The evidence shows that there was no delivery of said deed. It is an elementary principle of law that a deed has no effect until delivered. (See *Younge v. Giulbeau*, 3 Wall., 641; *Fairbanks v. Metcalf*, 8 Mass., 230; *Fisher v. Beckwith*, 30 Wis., 55.)

As long as the deed remains in the possession of the grantor the title is still in him. (*Brown v. Brown*, 66 Maine, 316; *Hadlock v. Hadlock*, 22 Ill., 388; *Mills v. Gore*, 20 Pick., 28.)

The alleged deed remains in the possession of the claimant, and the title to the 80-acre farm is in his name, and the holding by the Bureau that because of this deed the son was legally bound to support the claimant was clearly erroneous.

The evidence shows that the mother of the soldier, the wife of claimant, died prior to the filing of the original claim, on which the pension was allowed.

The dropping of claimant's name from the rolls for the reason given has been shown to be error, but there is another view in which the rejection of the claim may be sustained. Under the law of the State of Michigan children are bound to support their poor and aged parents, under certain circumstances.

Title XIII of the statutes of Michigan, page 488, volume 1, of Howell's Annotated Statutes of that State, paragraph 1741, section 1, contains the following:

The father, mother, and children, being of sufficient ability, of any poor person who is blind, old, lame, impotent, or decrepit, so as to be unable to maintain himself, shall, at their own charge, relieve and maintain such poor person, in such manner as shall be approved by the directors of the poor of the township where such poor person may be.

Sections 2, 3, and 4 of the same title provide the machinery of the law to carry into effect the above provision. Section 5 is as follows:

If it shall appear that any such relative is wholly unable to maintain such poor person, but is able to contribute toward his support, the court may, in its discretion, direct two or more relatives of different degrees to maintain such poor person, and shall prescribe the proportion that each shall contribute for that purpose; and if it shall appear that the relatives liable as aforesaid are not of sufficient ability wholly to maintain such poor person, but are able to contribute something therefor, the court shall direct the sum, in proportion to their ability, which such relatives shall severally pay weekly for that purpose.

The evidence in the case under consideration shows that the claimant is adequately supported by the income from the farm and the contributions of his son James C. and other sons and daughters. That these children are supporting their father *prima facie* shows their ability to do so, and in the absence of evidence showing that they are not able it will be presumed that they are.

At common law the child was not bound to support the parent in any event.

See Schouler's *Domestic Relations*, paragraph 264 et seq.; *Stone v. Stone* (32 Conn., 142); *Edwards v. Davis* (16 Johns. N. Y., 281); *Dawson v. Dawson* (12 Iowa, 512).

The evidence in this case shows that this claimant is being adequately supported by those, who, in the State of Michigan, are legally bound to support him.

The first section of the act of June 27, 1890, is as follows:

That in considering the pension claims of dependent parents, the fact of the soldier's death by reason of any wound, injury, casualty, or disease which, under the conditions and limitations of existing laws, would have entitled him to an invalid pension, and the fact that the soldier left no widow or minor children having been shown, as required by law, it shall be necessary only to show by competent and sufficient evidence that such parent or parents are without other present means of support than their own manual labor or the contributions of others not legally bound for their support.

This claimant, at the time he filed the claim in issue and up to the present, has been and is supported by his children, who, where he resides, are legally bound to such support when they are able so to do. It can not be said that they are unable to do what they are doing, in the absence of evidence going to establish that the support they do give is in deprivation of others who may be dependent on them. Even in the presence of the statute, if, as a matter of fact, the claimant was not adequately supported, he would still be pensionable. In other words, those legally bound must actually contribute an adequate support. The mere fact that they are legally bound, either by law or contract, is not sufficient to deprive a claimant of a pensionable status in cases where it is shown they are actually unable to furnish support; but where those legally bound are actually contributing an adequate

support it is clear a claimant is without the terms of the act above quoted. The gist of the issue here presented is whether the claimant is adequately supported by means of his own labor and the contributions of those bound by law to support him. His own statements and those of his witnesses clearly establish that he is adequately supported from the proceeds of his farm and the contributions of his children, who, in Michigan, are legally bound to support him if they are able.

Accordingly, the action of the Bureau is affirmed, but it is suggested that the ground of rejection be changed so as to show that the claim was rejected because the evidence in the case establishes that claimant is adequately supported from the proceeds of his farm and the contributions of those legally bound to support him, and is not dependent within the meaning of the act of June 27, 1890.

DIVISION OF PENSION, ACT OF MARCH 3, 1899—ARTICLES OF SEPARATION.

AMANDA CRAWFORD *v.* WILLIAM H. CRAWFORD.

Claimant, at the date of filing her claim for one-half of soldier's pension under the act of March 3, 1899, was living separate and apart from her husband, pursuant to a mutual agreement for separation executed December 17, 1898, which agreement was in full force and effect. She was, therefore, not in position to charge her husband with desertion, as his absence from her was with her consent and in accordance with her express agreement. *Stewart on Marriage and Divorce*, paragraph 256; 9 *Am. and Eng. Ency. L.* (2d ed.), 767; *Stoffer v. Stoffer* (50 Mich., 491); *Fleagle v. Fleagle* (12 P. D., 67).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 28, 1902.

Amanda Crawford, wife of William H. Crawford, late private, Company B, Thirty-fourth Ohio Infantry, and a pensioner under certificate No. 215380, appealed April 15, 1902, from the Bureau action of October 14, 1901, rejecting her claim under the act of March 3, 1899, for division of pension, filed May 27, 1901, on the ground that pensioner was not chargeable with desertion, their separation being by mutual consent and according to a mutual agreement entered into December 18, 1898.

Claimant contends that her signature to the articles of separation was obtained through false representations of pensioner and his attorney as to pensioner's ownership of real estate.

It appears that claimant and pensioner entered into an agreement for separation in the State of Ohio December 17, 1898, the validity of which was directly in issue in a suit for divorce in the court of common pleas, Brown County, Ohio, April 2, 1900, when the court held said agreement to be valid and a complete bar to her claim for alimony.

Claimant, at the date of filing her claim for one-half of soldier's pen-

sion under the act of March 3, 1899, was living separate and apart from her husband, pursuant to a mutual agreement for separation executed December 17, 1898, which agreement was in full force and effect. She was, therefore, not in position to charge her husband with desertion, as his absence from her was with her consent and in accordance with her express agreement. Stewart on Marriage and Divorce, paragraph 256; 9 Am. and Eng. Ency. of Law (2d ed.), 767; *Stoffer v. Stoffer* (50 Mich., 491); *Fleagle v. Fleagle* (12 P. D., 57).

The action appealed from is accordingly affirmed.

HELPLESS MINOR, ACT JUNE 27, 1890—MENTAL DEFICIENCY.

MINOR OF MYERS HORN.

This child, although sound in body, being so deficient mentally that he can not learn, has no memory, will work only under constant direct personal oversight, and will not be employed by anyone, even for his board only, is helpless within the meaning of the law.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 28, 1902.

This claim (under the proviso of section 3 of the act of June 27, 1890, relative to insane, idiotic, and otherwise permanently helpless children of deceased soldiers), filed December 17, 1896, on behalf of Nelson L. Horn, child of Myers Horn, who was a member of Company G, Twenty-sixth Ohio Infantry, from July 30, 1861, to October 21, 1865, and who died February 18, 1889, was rejected in January, 1902, on the ground that said child is not insane, idiotic, or otherwise permanently helpless within the meaning of said act; and on April 28, 1902, the claimant's attorneys appealed, contending that his condition is such as to bring him within the law.

In June, 1901, the soldier's widow was allowed pension, certificate No. 515212, under said act, from September 22, 1890, to date of her remarriage July 8, 1891, including pension on account of three minor children, one of whom was said Nelson L. Horn, who became 16 years of age July 20, 1893; another of whom attained that age September 26, 1899; and the third, Franklin, is yet upon the rolls, not attaining the age of 16 years until April 7, 1904.

Medical examination of said Nelson L. in September, 1901, showed him to be "in perfect physical condition, is perfectly able to perform manual labor, can feed, dress, and undress himself;" and he could tell his name and present residence, but not where he was born, or day or month, or where he had previously lived, or read or write, although some letters were known, or tell the use of money; and was, the surgeons say, "totally unfit to take care of himself," semiidiotic, and under ordinary circumstances could probably, they say, not find work, "as if left to himself would be as liable to do something or nothing

as what he was set at, and for that reason consider him disabled." This condition is, they add, permanent. He was then 24 years of age, and weighed 161 pounds.

On special examination it was shown that he had been in this mental condition since infancy and was probably of deficient mentality at birth, and that he has never had fits nor been injured. He attended school a few terms only, and was taken out because wholly devoid of ability to learn or to apply himself or to conform to school discipline. Several people have employed him on account of the fact that he was dependent upon his mother, who did washing for their support, but found he could not work without constant personal oversight and direction, and they finally refused to keep him, as he was more trouble to watch than his work was worth, they say. If left alone he is liable, his mother testifies, to drop his tools and sit down, and remain sitting for hours at a time; or, another witness says, will leave work entirely and go home. One employer placed him in the poorhouse, which he left, and his whereabouts were for some time unknown, he finally coming to his grandmother's or his aunt's, ragged and like a tramp, looking for his mother, to whom he was returned. He was unable to give any account of his whereabouts or of himself during his absence.

His grandmother testifies that they never thought of leaving him alone; that if told to build a fire he was as likely to build it on the porch as in the stove, and that he once, when 11 or 12 years old, picked up an ax and told his little sister to put her head on the block and he would cut it off, and she had laid her head down when his mother reached them only just in time to stop the blow. He appears now, however, to be harmless, although two aunts testify they would not remain alone in the house with him.

It is clearly shown by the testimony that notwithstanding this man is physically able to labor and has sufficient mentality to perform what he is directed personally to do, he is entirely irresponsible as an independent laborer, and is, in fact, when laboring with others such trouble that none will now employ him, even for his board only. It is stated that if left to himself he would soon land in the poorhouse, and is now, as he has been practically all his life, in fact, supported by his mother, who says that, while he has always worked more or less, and at times for wages of 25 cents a day or for board merely, no one will now hire him, and he has, in fact, done no hired work for two years.

Said proviso of section 3 of the act of June 27, 1890, is "that in case of a minor child being insane, idiotic, or otherwise permanently helpless, the pension shall continue during the life of said child, or during the period of such disability."

Construing this proviso, the Department held in the case of minor of Philip J. Conklin (10 P. D., 368) that an incapacity, by reason of

mental infirmity, for the intelligent pursuit of any vocation or for obtaining remunerative employment is such condition as entitles to continuance of pension under said proviso. As stated in that decision—

* * * Mind and body must cooperate in the performance of any character of manual labor, and where the strength and muscle must be guided and directed by the mind of another it is the same as the employment of two persons to do the work of one; and it is absurd to suppose that anyone would give employment to such a person as would require the constant aid and direction of another person.

And in the case of minor of William Johnson (9 P. D., 452), the Department held that this proviso "was undoubtedly made for the benefit of such children over 16 years of age as are mentally or physically incapable of taking care of themselves, and hence have to be assisted and cared for by parents or guardians;" and that the gist of this holding is that the helplessness contemplated by the statute is "not absolute incapacity for self-help in performing the ordinary daily functions of life, but inability to do business or to earn a livelihood; not the helplessness of the paralytic, but the helplessness of the child of tender years and immature mind."

Also, in considering the case of the minor of Elwood Morris (9 P. D., 353), the Department stated that—

In this case the child is vigorous in body, though dull in intellect, and he can perform some manual labor. It is evident, however, that what he earns is a very small fraction of what is necessary for his support. In fact, it may be safely said that so far as his ability for self-support is concerned it is not above that of an ordinarily healthy boy 12 years of age. He is still a burden upon his mother—still in need of her help—to as great a degree as when he was under the age of 16 years.

And in each of these cases cited pension on account of the minor child was continued accordingly. The case under consideration appears to be entirely in line with those, consistently with which, therefore, pension should be continued herein. After repeated failures to educate this child Nelson or to have him earn a support, he appears to be now helplessly indigent and dependent absolutely and entirely upon others therefor.

He is believed to be helpless within the meaning of the act of June 27, 1890, and the action appealed from, therefore, is reversed and you will readjudicate the claim accordingly.

SERVICE—MISSOURI MILITIA—ACT OF JUNE 27, 1890.

JOHN P. LESLIE.

The State militia organizations in which the service of this appellant during the war of the rebellion was rendered were in the service of the State of Missouri, and were never in the military service of the United States, and military service rendered therein confers no title to pension under the provisions of the second section of the act of June 27, 1890.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
May 28, 1902.*

John P. Leslie filed in the Pension Bureau, on October 24, 1890, an application for pension under the provisions of the second section of the act of June 27, 1890, alleging that he had served for ninety days and more during the war of the rebellion as a private in Company B, Forty-second Enrolled Missouri Militia, and also in Company F, Ninth Provisional Enrolled Missouri Militia; had been honorably discharged from said service, and was incapacitated for earning a support by manual labor by disabilities not the result of his own vicious habits. He subsequently amended said application by alleging that he had never served in Company F, Ninth Provisional Enrolled Missouri Militia, but that his second term of service had been performed in Capt. T. J. Babcock's Provisional Company (A), Miller County Enrolled Missouri Militia.

This application for pension was first rejected on February 10, 1892, upon the ground that the claimant had not served for ninety days in the military service of the United States during the war of the rebellion, but, subsequently, this action was set aside, and the claim reopened that it might be rejected on proper grounds, and on August 29, 1898, it was again rejected for the following stated reasons:

No title; the organization in which claimant served, Company A, Ninth Provisional Enrolled Missouri Militia (T. J. Babcock's), Miller County, was not mustered into the United States service, the same being a State organization, as is shown by the records of the War Department.

From this action the present appeal was taken on January 31, 1900.

The War Department reports that there is no record of either of the organizations to which the appellant belonged, and in which he alleges his military service during the war of the rebellion was rendered, having been mustered into the military service of the United States during the war of the rebellion, or having ever been in the military service of the United States at any time.

The Auditor of the Treasury for the War Department reports that the records of his office show that the appellant is borne on the rolls of Company B, Forty-second Enrolled Missouri Militia, as a private, from August 1 to November 20, 1862, when relieved. In service thirty days. Also on the rolls of same company from September 30, 1864, to November 30, 1864. In service four days, with remark, "on detached service with Captain Babcock." His name is borne on the rolls of Capt. T. J. Babcock's Company A, Ninth Provisional, doing duty as the Miller County Provisional Enrolled Missouri Militia, under General Orders, No. 107, from August 13 to December 23, 1864, when relieved. In service seventy-eight days.

In a subsequent communication the Auditor reports as follows:

On reexamination of this case in connection with the rolls of the provisional company mentioned in inclosed indorsement under date of October 23, 1901, it is found

that said company is designated "Captain T. J. Babcock's Company A, Miller County, Ninth Provisional Regiment Enrolled Missouri Militia," and that it was called out under General Orders, No. 107. It is also found that John P. Leslie was a private in said company from August 13 to December 23, 1864, when relieved, and that he is credited with only seventy-eight days' service. The records on file in this office do not show that the said John P. Leslie was a member of any organization of the Provisional Enrolled Missouri Militia other than the one above mentioned.

In a still later communication, under date of April 18, 1898, the Auditor reports as follows:

In the case of John P. Leslie, late a private in Company A, Ninth Regiment Provisional Enrolled Missouri Militia, the company commanded by Capt. Thomas J. Babcock is not regarded by this office as being a part of or as serving at any time with the Ninth Regiment Provisional Enrolled Missouri Militia, but appears to have been an independent provisional company organized under General Orders, No. 107.

So far as the first service of the appellant, in the Forty-second Enrolled Missouri Militia, is concerned, it was clearly not a pensionable service under the provisions of the act of June 27, 1890, since it is a well settled and established fact that none of the organizations of the Enrolled Missouri Militia were ever in the military service of the United States during the war of the rebellion, and service therein confers no pensionable title under said act.

Congress, however, by the joint resolution of February 15, 1895, extended to the officers and privates of the Provisional Missouri Militia, who served ninety days during the war of the rebellion, and were honorably discharged, and to the widows and minor children of such persons, the provisions and benefits of the act of June 27, 1890. This enactment referred to eleven regiments which were formed in February, 1863, from the Enrolled Missouri Militia, either by detail or enlistment, and which were denominated "Provisional Regiments of Missouri Militia," and were kept in active service continuously, under the command of United States officers, as long as and whenever they were needed during the remainder of the war. No other militia organizations of the State of Missouri are properly designated Provisional Enrolled Missouri Militia, and it has uniformly been accepted and held that the provisions of the joint resolution of February 15, 1895, applied to no other organizations called Provisional Missouri Militia, or Provisional Enrolled Missouri Militia, than the eleven regiments above referred to.

In June, 1864, under and in pursuance of General Order No. 107 of the adjutant-general of the State of Missouri, a number of companies were organized out of the Enrolled Missouri Militia, and directed "to hold themselves always in readiness to meet the ends of local defense." These companies were officered, armed, equipped, and paid by the State of Missouri, and were designated "Provisional Companies of Enrolled Missouri Militia." They were at all times during their existence exclusively in the service of the State of Mis-

souri, were never mustered into the military service of the United States, and performed no military service under the command of United States officers, or any other service than that for which they had been expressly organized, namely, "to meet the ends of local defense" in the respective counties of the State in which they were raised. These companies are not to be confounded with the organizations above referred to as Provisional Regiments of Enrolled Missouri Militia, and the provisions of the joint resolution of February 15, 1895, have no application to them, and the officers and privates of such companies have no pensionable status under the provisions of the act of June 27, 1890.

Although it would appear from the records of the Treasury Department, herein quoted, that the organization in which this appellant's second term of service was rendered was designated, in some reports, as "Captain T. J. Babcock's Company A, Miller County, Ninth Provisional Regiment Enrolled Missouri Militia," it is clearly shown that said company was not a part of the Ninth Regiment Provisional Enrolled Missouri Militia, but was one of the Provisional Companies of Enrolled Missouri Militia whose organization, character, and service have been above described. (See report of the adjutant-general of Missouri for 1865, page 631, where this company appears in the list of "Provisional Companies" organized under General Order No. 107, of June 28, 1864).

Said company was therefore not included within the provisions of the joint resolution of February 15, 1895, and the members of said organization, not having been in the military service of the United States during the war of the rebellion, have no pensionable title whatever under the provisions of the act of June 27, 1890.

It follows, therefore, that the rejection of appellant's application for pension upon the ground stated was not error, and said action is affirmed accordingly.

DIVISION OF PENSION—COMMENCEMENT—DECLARATION—NOTICE—
PROOF—SUSPENSION OF PAYMENT.

CAROLINE ADAMS *v.* GEORGE ADAMS.

Appellant filed her claim under the act of March 3, 1899, on April 11, 1901, and it having been established that pensioner was at that date an inmate of a State Home, and had been an inmate of such Home from the date of the quarterly payment of his pension preceding the filing of such claim, March 4, 1901, and continuously since, and had also deserted said claimant over six months prior to said quarterly payment and subsequent to the passage of said act, and had been in such desertion continuously since, on the allowance of her claim the payment of one-half of such pension should have commenced from said last quarterly payment, March 4, 1901, under the decision in the case of *Cooper v. Cooper* (12 P. D., 163).

2. The practice of the Bureau of Pensions in paying the wife of a pensioner, under the act of March 3, 1899, one-half only of so much of the pension as remains in

the hands of the pension agent on the quarterly payment day subsequent to the allowance of the claim is abrogated.

3. The filing of a valid declaration for division of pension under the act of March 3, 1899, is notice to the Government of the claim for one-half of the pension that may be due or accruing on said date, and further payment of one-half the pension becoming due to the pensioner should be suspended until the adjudication of the claim, and for the period thereafter allowed for appeal, unless an appeal is waived.
4. A declaration under the act of March 3, 1899, must be accompanied by proof in support thereof sufficient to establish a prima facie case under the law.
5. The Bureau of Pensions will promptly notify the claimant and pensioner of the action taken in a claim filed under the act of March 3, 1899, and that thirty days from the receipt of such notice will be allowed in which to file an appeal, during which period payment of one-half of the pension involved will be suspended, unless an appeal is waived.
6. The face brief should show the date on which payment to the wife of one-half of her husband's pension commenced.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
May 8, 1902.*

Caroline Adams, wife of George Adams, late private, Company B, Twelfth Michigan Infantry, and a pensioner under certificate No. 916710, appealed, by her attorney, March 18, 1902, from the Bureau action of January 3, 1902, allowing her claim, filed April 11, 1901, for division of pension under the act of March 3, 1899, and awarding her one-half of her husband's pension from December 4, 1901.

It is contended, on behalf of claimant, that as the proof shows desertion in July, 1892, and continuance thereof, that she is entitled to one-half of her husband's pension from September 3, 1899, six months after the passage of the act of March 3, 1899, under the first proviso of said act. Also that, as the proof shows that soldier has resided continuously in a State Home for soldiers, and has drawn his pension in said Home continuously since September 25, 1900, claimant would be entitled to one-half his pension from that date under the second proviso of said act; citing the case of *Cooper v. Cooper* (12 P. D., 163).

Pensioner, by his attorney, contends that claimant has not authorized this appeal; that his leaving her was not such as to amount to willful desertion; that their relations are friendly and cordial, and quite satisfactory to both parties; that, in addition to the sum awarded her by the Department, he paid her \$14 in September, 1901, and \$18 in December, 1901; that he makes no complaint of or questions the legality of the Bureau action of January 3, 1902, awarding claimant one-half his pension from December 4, 1901, and that the appeal is frivolous, untenable, and without force of legal reasoning.

Referring to the act of March 3, 1899, he further contends as follows:

The law quoted and relied on is quite clear and unambiguous: "One-half of the pension due or to become due said pensioner during the continuance of said desertion;" and again, as quoted, "one-half of his pension accruing during his residence

therein," i. e., Soldiers' Home—it will be observed the language is referring to such sums *are due or to become due, or are accruing*, as used in the second order.

This law is analogous to the law of garnishment and attachments, and I submit the same rules of law govern. This law is not retroactive of itself or in its effect, neither can it be and remain constitutional. Where there is *nothing due or accruing due*, no order can be made. In this case all sums due the pensioner had been paid by the Government, and they thereby fully discharged from any further obligation. Our contention is that no case had been made or entered or adjudicated on, until the said 3d day of January, 1902, and the Department could have no jurisdiction over the case save as to such sums as were due or accruing at that date.

The contention of the appellant that the order should date from September 25, 1900, is a false proposition. Such an order would in effect be retroactive, and in my opinion unconstitutional and beyond the power of any court or tribunal known in these United States; such an order would be unreasonable and work innumerable wrongs, and make trouble. The language of the act leaves no question as to its full meaning. *Due or accruing due* can not mean only one thing and refer only to such sums are due at the date of the order or such sums as may be coming due.

In this case the appellee had been paid his pension regularly at times and in the manner provided by the pension act no complaint, or protest had been entered or notice to any one of any intention to complain or protest until this case was entered a short time prior to its adjudication, and therefore the appellant could not be entitled to any part of the said pension until she had proved her right thereto, and even then could participate only in such sums as were due or coming (*accruing*) due at that particular time. It appears to me any other rule is repugnant to natural common sense, let alone logical reasoning.

I therefore respectfully submit that the Department at this time has no authority under the law quoted and referred to by the appellant to stop any further sum or sums of pension money due or accruing due than such as may become operative under the decision of January 3, 1902.

The Bureau reported, March 27, 1902, that the uniform practice in this class of cases, under the act of March 3, 1899, since the passage of the act, had been to—

commence payment with one-half of so much of the unpaid pension as remains in the hands of the United States pension agent on the quarter payment day subsequent to the allowance of the claim, and not from the date of the filing of the application.

The order to the United States pension agent, issued upon the allowance of the claim, directs him to pay to the wife one-half of the pension due or to become due.

On April 12, 1902, the Bureau further reported as follows:

Payment was made through the Soldiers' Home to the pensioner from September 4, 1900, to March 4, 1902, inclusive, in the sum of \$156.

Payment was made to pensioner for the quarter ending March 4, 1901, on March 5, and payment to Caroline Adams, the wife of this pensioner, of the sum of \$12 on March 7, 1902, for the quarter from December 4, 1901, to March 4, 1902.

Claimant filed her application for division of pension under said act April 11, 1901, in which she alleged that her said husband deserted her in July, 1892, and that present whereabouts was unknown.

Her claim was rejected by Bureau action of July 10, 1901, on the ground that—

pensioner was not chargeable with desertion, claimant having refused to accept of his invitation to go with him to Otsego to live.

From this action claimant appealed, September 21, 1901, which appeal was perfected by due proof of service and docketed November 4, 1901, and on December 11, 1901, this Department reversed said Bureau action, and held that the evidence fairly showed that pensioner had deserted his wife, a woman of good moral character, and in necessitous circumstances, for more than six months prior to her application, April 11, 1901, and that he was an inmate of the State Home for Soldiers at Grand Rapids, Mich:

January 3, 1902, her claim was allowed by the Bureau, but there is nothing on the face brief containing the record of the Bureau action to indicate when the division of pension commenced.

It now appears, from the Bureau report, that the division of pension was made to commence from December 4, 1901.

The Department has passed upon the question of desertion and no reason appears for further considering that branch of the case.

The only question raised by this appeal is the date of commencement of division of pension, and whether the uniform practice of the Bureau in commencing payment with "one-half of the unpaid pension as remains in the hands of the United States pension agent on the quarter payment day subsequent to the allowance of the claim," is authorized or permissible under the provisions of said act of March 3, 1899.

The Department has never ruled explicitly upon this question, although in the *Rothery* case (11 P. D., 77) it was held that the act was not retroactive but prospective in its operation, and that division of pension based on desertion of the wife by the husband could not commence until after six months from the passage of the act, for the reason that the desertion named in the act could not exist prior to that time. See, also, the *Richards* case (*ibid.*, 90).

In the *Filones* case (12 P. D., 237) it was held that as the—

pensioner was shown to have been an inmate of a State home for soldiers or sailors for over two months after the filing of an application by his wife for division of his pension, under the second proviso of the act of March 3, 1899, the rejection of her said claim on the ground that the pensioner was not, at the date of the adjudication, an inmate of a soldiers' home, was error.

The inference to be drawn from that decision is that a claimant's application under said act becomes material as affecting her title to division of pension, and that the date of the adjudication of her claim was immaterial as affecting the commencement of her right to one-half of her husband's pension under the second proviso of said act.

This is the first appeal directly raising the question as to the date of the commencement of division of pensions under said act, and as the practice of the Bureau has been to uniformly commence the division of pension under said act from the quarterly payment day subsequent to the allowance of the claim, and not from the date of filing the application, according to the Bureau report of March 27, 1902, in this case,

that practice should not be disturbed unless clearly violative of the legal right of the claimant or the pensioner.

While the act of March 3, 1899, is silent on the subject of declarations or applications on the part of a claimant, it does provide that the question of desertion, entrance into a home, necessitous circumstances, and good moral character shall be ascertained and determined by the Commissioner of Pensions under such rules and regulations as he shall prescribe.

The forms of declaration by the wife, minor children, and permanently helpless and dependent child, under said act, is prescribed and published. See pages 251 to 255, *Laws of the United States Governing the Granting of Army and Navy Pensions*, compiled May, 1899.

Section 4714, Revised Statutes, and acts of July 1, 1890, September 1, 1890, and July 26, 1892, provide how declarations of pension claimants shall be executed and verified. See *ibid.*, pages 105 to 108.

Claimant's declaration, filed April 11, 1901, was regular in form, and conformed to the law and the rules and regulations. It contained allegations which, if true, entitled her to all her legal rights under said act from that date. This declaration conferred upon the Commissioner of Pensions jurisdiction to adjudicate her claim under the law, ascertain and determine the question of desertion, entrance into a home, necessitous circumstances, her good moral character, and, if these questions were determined in her favor, to award her one-half of her husband's pension from such periods as she had shown herself entitled thereto under the act.

But for the declaration neither the Bureau of Pensions nor this Department would have had any jurisdiction or authority of law for passing upon any of these questions in this case.

The filing of her declaration was the inception of her claim, and, aside from conferring jurisdiction upon the Bureau to adjudicate her claim, also served notice upon the Government of her claim upon one-half of the unpaid pension owing or accruing to the pensioner at the date on which the declaration was filed and during the continuance of desertion or residence of pensioner in a home subsequent thereto.

There is nothing in the act indicating that her right to "one-half of the pension due or to become due said pensioner during the continuance of such desertion," as granted her by the first proviso, or "accruing during his residence in a State home," as provided in the second proviso of said act, is to depend upon the date on which her claim is adjudicated in the Bureau.

On the contrary, the act is mandatory in its terms as to the payment of one-half of the pension to the wife, the facts being established, the language being:

The Commissioner of Pensions is hereby directed * * * to cause one-half of the pension due or to become due said pensioner during the continuance of such desertion to be paid to the wife.

Continuance from what time? Clearly from the time she files her declaration, not from the date of adjudication. When the facts are established on which title to one-half the pension depends, the law, and not an adjudicating officer, grants the division of pension. To hold otherwise would be to place it in the power of an administrative officer to postpone and practically defeat a division of pension in any case and thus nullify the act of Congress.

Congress is the only power authorized to grant Federal pensions and designate the beneficiaries, and when, as in the act of March 3, 1899, it is enacted that the wife of a pensioner shall, on the establishment of certain facts, in a certain manner, be entitled to one-half of the pension during a certain period, or a period to be made certain by proof, her right becomes as valid and sacred and is to be as jealously and carefully guarded and enforced as is the original right of the pensioner.

All acts of Congress, unless otherwise provided, speak and become operative from the date of their enactment (Sutherland on Statutory Construction, paragraphs 104 and 106), and in the absence of a limitation entitle the beneficiary named in the act to the benefits conferred from the date of the act, if it be subsequently established that the conditions on which the benefit depends existed at that date.

As stated in the recent decision in the case of Robert Markwood (11 P. D., 380):

Recitals in statutes, however, that pension shall commence at the date of the filing of the application are terms of limitation, and this Department has no right or authority to introduce such a limitation into an act by construction unless the terms of the act, either express or implied, warrant such a procedure. * * * It would appear, without discussion, that, in the absence of a prohibitory statutory provision, one would necessarily be entitled to the emoluments and benefits of a conceded legal right from the date at which it is established by proof that he was entitled to such emoluments and benefits.

In that case order No. 231, which provided that—

the date of commencement in Mexican war claims for increase under the act of January 5, 1893, shall in each claim be the day on which the case was legally approved by the board of review—

was abrogated and annulled, as arbitrary, unreasonable, inequitable, unjust, and without authority of law; and the reasons for so holding in that case would appear to apply equally to the practice of the Bureau in this class of cases under the act of March 3, 1899, and to this case.

It by no means follows, however, because claimant has established the continuance of desertion from the date of the passage of the act, that she is entitled under her said application or declaration to one-half of her husband's pension, under the first proviso, from September 3, 1899, as contended by attorney for appellant, or that she is entitled to one-half of said pension from September 25, 1900, the time

when he entered the State home, where he has since continued to reside as an inmate thereof, under the second proviso, for the reason that on the date of filing her said declaration the only pension "due or to become due said pensioner," or "accruing during his residence therein," i. e., the State home, was that which accrued subsequent to March 4, 1901, he having drawn his pension up to that date. This pension money, up to March 4, 1901, was legally paid to pensioner by the Government without notice of the right of claimant, and had ceased to be due or accruing at the date she filed her application. Having passed from the control of the Government to the pensioner without fraud or mistake, and without notice of claimant's claim of title to one-half thereof, it does not come within the provisions of the act, and claimant has no title thereto or any portion thereof. The word "due" as used in said act is synonymous with owing. See *Cooper v. Cooper* (12 P. D., 163).

When, however, claimant, on April 11, 1901, asserted her title to one-half of her husband's pension under the law, the Government was bound to take notice of her claim, and as a matter of safety and precaution should have withheld payment of one-half of the pension due, or to become due, or accruing subsequent to that date until the adjudication of her claim. Instead of so doing, it appears that pensioner was paid three quarterly payments from March 4, 1901, to December 4, 1901, thus including the one-half of the pension money to which she had laid claim and to which she became entitled upon the allowance of her claim.

The payments to the pensioner of moneys to which he was not entitled and which should have been paid to the claimant were unauthorized and against her legal right, and the last quarterly payment, of December 4, 1901, was also made in direct violation of the instructions of this Department and was in conflict with rule 14, Rules of Practice, approved November 2, 1901, which provided in express terms that—

The appeal will operate to suspend further payment of the one-half pension in controversy until a decision shall have been rendered therein by the Department.

Claimant had a valid appeal pending in this Department November 4, 1901, from the Bureau action of July 10, 1901, rejecting her claim, and this should have suspended the December payment of the one-half pension in controversy under said rule 14.

As early as August 31, 1901, the Department, in considering the case of *Loughry v. Loughry* (11 P. D., 523), in response to the contention of the pensioner, appellant in that case, that the payment of one-half of his pension to his wife be suspended pending the decision on his appeal, stated:

It will not be assumed that the Bureau would continue the payment of money to the wife while the question as to her right to receive the same was pending before the Department.

In replying to Bureau inquiry of September 26, 1901, in the Laughry case, above referred to, as to—

First. Whether it was the intention of the Department to hold that where a case has been allowed under the act of March 3, 1899, and an appeal filed, this Bureau is to suspend payment to the wife pending the decision of the appeal; and

Second. If suspension of payment to the wife is to be made pending an appeal in the act of March 3, 1899, cases, is it the desire that payment be made to the pensioner of the entire amount pending decision on the appeal, or to suspend the one-half the pension that may be due the wife?

It was stated by the Department that—

The legal effect of an appeal by either party from the Bureau action under the act of March 3, 1899, involving the question of a division of the soldier's pension is to suspend the payment of so much of the pension money as is involved in the action appealed from, and no more; i. e., one-half the amount of the pension from the date of filing the application therefor, under said act, or so much thereof as remains unpaid at date of filing a completed appeal.

The same reason for withholding payment of the one-half of the pension, the title to which is in controversy, from the date of filing the appeal, applies equally to the suspension of payment of the one-half pension in controversy from the date of filing an application therefor under said act.

The application or declaration of a claimant, under said act of March 3, 1899, like an appeal by claimant or pensioner, serves the purpose of a writ of supersedeas, or other similar writs, and should stay further Bureau proceedings, so far as they involve further payment of the one-half of the pension in controversy pending the adjudication of the claim by the Commissioner of Pensions in the first instance; or pending the consideration of the appeal by the Secretary in the second. As substantially stated by the attorney for the appellee, they are analogous to writs of garnishment or attachment in suits at law, and hold the property in statu quo, pending the determination of the question of title.

Such must necessarily be the legal effect of a declaration or appeal, in cases arising under said act, as otherwise claimants or appellants would be without an adequate remedy to protect their legal right, and the Government might be compelled to repay to claimants or pensioners money wrongfully paid to those found not entitled thereto under the law.

In reaching this conclusion the Department has fully considered the act of December 21, 1893, which declares a pension to "be a vested right to that extent that payment thereof shall not be withheld or suspended until after due notice to the grantee of not less than thirty days," etc., and also the provisions of section 4766, Revised Statutes, and the various amendments thereof. Construing the act of March 3, 1899, in pari materia with the foregoing acts, it is clear that Congress has by the later act provided for withholding or suspending payment of pension during the continuance of the desertion named in the act,

or during the residence of the pensioner in a State or National Home, and pending the adjudication of claims for division of pension under said act.

In view of this fact and in order that pensions may not be vexatiously withheld or suspended, in cases arising under this act, it is evident that applications should be promptly considered by the Bureau and that appeals should be limited as to time.

In future applications under this act for division of pension, you will require the claimants to file with their declarations proof in support thereof, sufficient to establish a prima facie case under the law.

Upon the adjudication of a claim under said act of March 3, 1899, the Bureau will promptly notify both parties of the action taken, by registered letter, informing them at the same time that they will be allowed thirty days from the receipt of said notice to appeal from said action, inclosing a copy of Rules 14, 15, and 16 of Practice. You will also suspend payment of the one-half pension involved in the claim, until the expiration of said thirty days, unless the right of appeal should be sooner waived by both parties.

In future you will cause to be indicated on the face brief, in cases under said act, the date from which division of pension is made to commence.

In the case under consideration the Department is of the opinion that, as the proof established statutory desertion prior to March 4, 1901, and continuance thereof, and also showed that pensioner had resided in a State home for soldiers continuously since that date, claimant was entitled, under her declaration, filed April 11, 1901, to one-half his pension accruing subsequent to March 4, 1901, under the plain provisions of said act of March 3, 1899.

As pensioner in this case was erroneously paid on the quarters ending June 4, September 4, and December 4, 1901, the one-half of the pension to which claimant was legally entitled, you are directed to withhold from future payments on his said pension and pay to claimant a sum equal to that which she was entitled to receive, to wit, \$36.

It becomes unnecessary to discuss the question as to the payments alleged to have been made by pensioner to claimant, as there is no proof of said payments; and, if made, they would only become material as affecting the question of her necessitous circumstances. So, also, the conclusions reached herein in no manner conflict with the holding of this Department that said act is not retroactive.

Your attention is invited to the fact that the duplicate copies of the Departmental decision of December 11, 1901, in this case, which were prepared for and directed to be forwarded to claimant or her attorney and the pensioner, are still on file and found with the papers in the case.

If these copies of said decision were not forwarded to the parties, as heretofore directed, you will cause the same to be forwarded, together with copies of this decision, herewith inclosed.

The action appealed from is, to the extent herein indicated, reversed.

DESERTION—DISCHARGE—SERVICE.

SANDFORD P., ALIAS PETER S., BURKE.

It appearing from the official record of this appellant's military service, and from his own sworn statements, that the disabilities on account of which he was formerly pensioned had been contracted during a term of enlistment from which he had deserted, and from which he had never been discharged, he is not entitled to be restored to the pension roll, for the reason that there is no period from which pension on account thereof could properly be made to commence under the law, and he, having violated and repudiated his said contract of enlistment, has forfeited all right to any benefits that were incident to such enlistment. (John Norton, 9 P. D., 382; Lewis Rankin, 11 P. D., 373.)

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
May 31, 1902.*

Sandford P. Burke, alias Peter S. Burke, late a private in Company H, Sixth Iowa Volunteer Infantry; Company K, One hundred and twenty-fifth Illinois Volunteer Infantry; Troop L, Fourth United States Cavalry, and Company B, Eleventh Indiana Volunteer Cavalry, was formerly pensioned under the provisions of the general pension law for rheumatism and resulting disease of heart, and was last paid said pension at the rate of \$8 per month. On September 1, 1890, said pensioner was allowed a pension under the provisions of the second section of the act of June 27, 1890, at the rate of \$12 per month, from August 13, 1890. On February 3, 1897, he was, after due and legal notice, dropped from the pension roll, and his pension terminated upon the ground that he was a deserter from Company H, Sixth Iowa Volunteer Infantry, and from Troop L, Fourth United States Cavalry, and had never been discharged from either of said organizations.

On March 31, 1898, said pensioner filed in the Pension Bureau an application for restoration of his pension under the general law, based upon the same disabling causes for which he had been previously pensioned thereunder. This application was rejected on December 15, 1899, upon the ground that he had no title to pension under the law, it being admitted by him under oath that said disabling causes had been contracted during his enlistment in Company H, Sixth Iowa Volunteer Infantry, from which enlistment he deserted, and was never discharged.

From this action the present appeal was taken on January 9, 1900.

It appears from the official military records of the War Department that this appellant first enlisted for military service during the war of the rebellion on July 17, 1861, in Company H, Sixth Iowa Volunteer Infantry, for a term of three years, and served therein until April 8, 1862, when he deserted, and never afterwards returned to said organization. He enlisted the second time under the name of Peter S. Burke, while still in desertion from his first enlistment, in Company K, One hundred and twenty-fifth Illinois Volunteer Infantry, on August 13, 1862, for a term of three years, and served in this organization until December 17, 1862, when he was discharged under General Orders No. 154, A. G. O., of 1862, by reason of enlistment in Troop L, Fourth United States Cavalry, United States Army. He enlisted a third time, still being in desertion from his first enlistment, on December 18, 1862, in Troop L, Fourth Cavalry, United States Army, for a term of three years, and served therein until August 12, 1863, when he again deserted from this organization, and never returned thereto. His fourth and last enlistment was on March 25, 1864, in Company B, Eleventh Indiana Volunteer Cavalry, for a term of three years, he being in desertion both from his first and third enlistments, and served in this last-named organization until July 31, 1865, upon which date he was discharged from the service upon a surgeon's certificate of disability, because of general debility resulting from typhoid fever. The charge of desertion from the appellant's first and third enlistments has never been removed, and he is borne as a deserter on the rolls of Company H, Sixth Iowa Volunteer Infantry, and of Troop L, Fourth Cavalry, United States Army, in the records of the War Department. The appellant's contract of enlistment in Company H, Sixth Iowa Volunteer Infantry, did not expire by limitation until July, 1864; and his contract of enlistment in Troop L, Fourth Cavalry, United States Army, did not expire until December, 1865.

In his original application for pension under the general law, the appellant alleged that he contracted the rheumatism and disease of heart, for which pension was allowed him, in the winter of 1864 and the spring of 1865, while serving under his last contract of enlistment in Company B, Eleventh Indiana Volunteer Cavalry. In an affidavit, however, filed on November 14, 1899, in support of his application for restoration of his pension under the general law, he makes the following specific, sworn statement relative to the time, place, and circumstances of the incurrance of said disabling causes:

Affiant further swears that, to the best of his knowledge and belief, he first contracted rheumatism and disease of heart about the time of the battle of Shiloh, Tenn., April 6, 1862, and that the same was superinduced from excessive work and over-exertion, together with the deprivations, exposure, and hardships coincident to this

terrible battle, and the resultant strain on affiant's entire nervous system. Affiant further states that at no time in his life previous to the 6th day of April, 1862, did he at any time have rheumatism or heart disease.

This sworn statement of the appellant definitely fixes, for the first time in the history of this case, the exact or approximate date of the contraction of rheumatism and disease of heart during his military service, and positively shows that said disabling causes were contracted during the appellant's first term of enlistment, from which he deserted.

In the decision rendered in the case of John Norton (9 P. D., 382), the whole subject of desertion, in its relation to and bearing upon pensions and claimants for pension, was thoroughly and exhaustively discussed and carefully considered, and four general propositions or rules were deduced and laid down which have since guided and controlled the adjudication of claims for pension in which a charge of desertion appeared standing against the claimant.

The second one of said rules, which is the one applicable to the facts of the present case, is as follows:

In claims for pension under sections 4692 and 4693, Revised Statutes, on account of disability incurred in the line of duty during a term of enlistment from which the claimant deserted, the claim should be rejected, for the reason that there is no period from which the pension could commence, as claimant had never been discharged from such term of service; and for the further reason that claimant having violated and repudiated his said contract of enlistment, he thus forfeited all right to any benefits that were incident to such enlistment.

It is apparent, under this rule, that the appellant having, according to his own statement, contracted the disability for which he was formerly pensioned during the term of enlistment from which he deserted and was never discharged, would have no title to pension on account thereof, and could not be restored to the roll under the general law. The appellant alleges in his present appeal that he also incurred a gunshot wound of left arm at the battle of Shiloh, Tenn., on April 6 or 7, 1862. This gunshot wound was mentioned by the appellant for the first time in the affidavit above referred to herein, and has never been alleged by him in any application as basis for pension; but if it had, he could not be pensioned on account thereof, for the same reasons that apply to the disabling causes for which he was formerly pensioned.

Even if it should be conceded that the rheumatism and disease of heart for which the appellant was formerly pensioned had been contracted by him during his last term of enlistment in Company B, Eleventh Indiana Volunteer Cavalry, during the latter part of the winter of 1864 and the spring of 1865, as alleged by him in his original application for pension under the general law, he would still not be entitled to pension on account thereof, and the pension formerly allowed him could not be restored, for the reason that it clearly appears

from the foregoing official record of his military service that at said time he was in desertion from Troop L, Fourth Cavalry, United States Army, his contract of enlistment in that organization not expiring by imitation until December, 1865. He was, therefore, even in the spring of 1865, not in line of duty, but in desertion from a prior term of service, and absent from his proper command without leave, and disability incurred or contracted at such a time, and under such circumstances, is not pensionable. See decisions in the cases of John Norton (9 P. D., 382), Patrick H. Burns (11 P. D., 332 and 362), and Lewis Rankin (*ibid.*, 373).

It is very evident, therefore, that the action rejecting this appellant's application for restoration of his pension under the general law was in strict accord with the law and the decisions of this Department. Said action is accordingly hereby affirmed.

MARRIAGE AND DIVORCE—LAWS OF LOUISIANA—CONTRACT.

FRANCOISE GABRIEL.

Under the laws of the State of Louisiana, the claimant is held to have been the lawful wife of the soldier from the year 1880, up to the time of his death, on January 4, 1898. About the year 1880, both parties being able to consent and able to contract, mutually agreed to enter the state of matrimony. From that time to the date of the soldier's death they lived together and cohabited as man and wife, and, as such, held themselves out to the world. During that whole period, they were regarded as man and wife by neighbors and friends among whom they lived.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 7, 1902.

Pierre Gabriel, formerly of Company G, Seventy-third United States Colored Volunteer Infantry, enlisted on September 10, 1862, and was honorably discharged on July 8, 1865. It appears that he died on January 4, 1898, being borne upon the pension roll, at the time of his death, under the act of June 27, 1890.

On March 4, 1898, his widow, Francoise Gabriel, filed a declaration for pension under the act of June 27, 1890, which claim was rejected on April 12, 1899, on the ground that she married the soldier on October 17, 1896, subsequently to the passage of said act.

In the months of September and October, 1901, she filed additional evidence in support of an application to reopen her claim. Said evidence was considered on January 23, 1902, and held to be insufficient to warrant any change of action, on the ground that the relations existing between claimant and soldier before their marriage by formal ceremony on October 17, 1896, are not sufficient to constitute a marriage under common-law rules.

From this action appeal was taken on April 12, 1902, resting upon the contention therein set forth as follows:

It appears that the soldier and this claimant began living together as man and wife in 1880, and continued their cohabitation as man and wife from that time until soldier's death; that they were recognized in the community as man and wife, and that the child Marie Camille, born February 10, 1883, was baptized as their legitimate child.

It does not appear that there was any legal barrier to their marriage at the time their cohabitation began, and it is alleged by claimant that the only reason no ceremony was performed at that time was because of lack of money; that in September, 1896, soldier made a little money that he could spare, and so they had the ceremony performed the following month.

This appeal is taken on the ground that the cohabitation above referred to constituted a marriage under common-law rules in accordance with the laws of Louisiana. Reference is made to decision of the Secretary in re Minna Wilson (P. D., XI, 339), which seems to be applicable to this case, but which would seem to have been ignored by the Bureau in its objection.

The facts in this case are as follows: The claimant and the soldier, living in the State of Louisiana, both being capable of consent and qualified to enter into a contract, no impediment existing, on or about the year 1880, by mutual agreement, entered into the state of matrimony. In pursuance of said agreement they began to live together and cohabit and represented themselves to their neighbors and friends as sustaining the relation of man and wife. Several witnesses testified to these facts, and their testimony is uncontroverted. They also testified that the parties lived together in that relation up to the time of soldier's death, and, had always since the date above mentioned, been regarded as man and wife in the neighborhood in which they resided. It also appears that, while they were so cohabiting and living together, claimant gave birth to a child on February 10, 1883, which child was named by them Marie Camille Gabriel. It appears from the records of the Church of Annunciation, located at 1209 Mandeville street, city of New Orleans, that said child was baptized on March 28, 1883, as the legitimate daughter of the claimant and the soldier. It also appears that the parties were married by ceremony on October 17, 1896.

It is contended that, under the laws of Louisiana, the parties sustained the lawful relation of man and wife from the time that they originally entered into the state of matrimony, and held themselves out to the world as having assumed that relation. The case of Minna Wilson (11 P. D., 339), is cited as authority in support of this contention. In that case it was held as follows:

There being no proof or facts warranting the presumption of a prior marriage by the soldier, and the undisputed evidence showing that claimant and soldier lived and cohabited together as man and wife for eleven years in the State of Louisiana, the law of that State would presume them married, and the claimant is therefore entitled to pension as the lawful widow of the soldier.

In the case of *Holmes v. Holmes* (6 La., 463) it is held that—

Marriage is regarded in our law in no other light than as a civil contract, highly favored, and depending essentially on the free consent of the parties capable by law of contracting. Our code does not declare null a marriage not preceded by a license and not evidenced by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of a marriage. These laws relating to forms and ceremonies, here regarded as directory to those alone who are authorized to celebrate marriages, are intended to guard against hasty and inconsiderate marriages in defiance of parental authority. Like all other contracts, it may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence within the power of the party, and cohabitation as man and wife furnishes presumptive evidence of a preceding marriage. It is not to be presumed that those who hold themselves out in society as man and wife, who are rearing a family of children at their domestic board, to whom the father gives his name and administers a parent's protection and support, are living in open disregard of public morals, and that their common offspring are bastards. Such a family is already in the possession of a civil condition or status not to be questioned lightly or collaterally.

In the case of *Blasini et al v. the Succession of Blasini* (30 La. An., 1368) it was held as follows:

The law will not tolerate the presumption that a man and woman who lived together publicly as husband and wife are really living in concubinage in violation of law and public decency. From certain established facts certain legal presumptions are deduced, and when it is proven that the parties, from the time of their first appearing together in the community in which they made their permanent domicile, publicly cohabited, assuming to be husband and wife, without separation or interruption until death intervened; that the woman bore the man's name, and he called her his wife and introduced her as his wife, and declared that he had married her; where they present to the world their offspring as their children, and rear and care for them, the law accords to the man and woman and to their children a legal and social status, based upon the presumption of marriage, the consequences of which is the presumption of legitimate filiation and descent, which imposes on those who assert the contrary the burden of destroying that presumption. This presumption does not sanction voluntary cohabitation, nor elevate concubinage, of whatever duration, to the dignity of marriage. When it is said that marriage may be proven by reputation, the meaning is that the acts and conduct of the parties, as established by satisfactory proof, authorize and create the presumption that they were actually married, and this presumption is such that it yields only to proof that there was no such marriage, or that it was void because of some nullity established by law.

The laws of Louisiana are peculiar in some respects. That Commonwealth has a system of its own, derived from the laws of France and Spain, which are based upon the civil law of Rome. Under its laws, the marriage which is presumed to have occurred in the light of proven facts recited in the above decisions, is not such, necessarily, as has been celebrated by ceremony after license obtained, but such as may have been the result of a simple contract to enter into the state of matrimony, and subsequently carried into effect, by parties qualified to contract. In several of the States no celebration of marriage is necessary to make it valid and lawful. Stewart, on *Marriage and Divorce* (p. 81, sec. 94), mentions the States in which no celebration is necessary, and among them is the State of Louisiana. In support

of this statement the author, among other authorities, cites the cases of Holmes and Blasini above referred to.

It is true that the claimant and the soldier were married by ceremony in 1896, a fact which probably gave rise to the inference that they believed that their former relations were unlawful. Such indeed may have been their belief at the time of the ceremonial marriage, and such belief may have been, and probably was, the result of recent advice upon which they promptly acted; but that condition is not sufficient to abrogate or nullify a lawful status which had been previously established. The baptism of their child in 1883, and the christening of the same, as their legitimate offspring, was tantamount to a public declaration to the world that they, at that time, believed themselves to be man and wife. The laws of Louisiana made them such, and neither of them could by any subsequent act or declaration, have repudiated or destroyed such a lawful status.

In the light of these facts it is held that the claimant is the lawful widow of the soldier, in view of which the action complained of is reversed, with directions that the claim be readjudicated in accordance with this opinion.

SERVICE—MILITIA—SECTION 4693 OF THE REVISED STATUTES.

DANIEL B. TYLER.

Soldier enlisted for three months, on April 16, 1861, in the Sixth Massachusetts Volunteers, and was injured while serving in said organization in the riot in the city of Baltimore on April 19, 1861, being left in said city by his officers. He was never mustered into or out of said service, and the War Department declines to issue a discharge in his case.

Held: He was a member during the period involved of the Sixth Massachusetts Volunteers, an organization which was a component part of the Army, said organization having been called into the service of the United States by orders of the President, lawfully issued.

He was discharged by operation of law from said service when his term of engagement ceased, or when the war of the rebellion ended. He has a pensionable status as a militiaman under the first subdivision of section 4693, R. S. (U. S. r. North, 112 U. S., 510, and Randolph M. Manley, 5 P. D., 295, and cases therein cited.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 7, 1902.

Daniel B. Tyler, formerly a private in Company M, First Massachusetts Volunteer Cavalry, filed his declaration under the general law on March 18, 1881; he died on the 24th day of said month of the same year, and his widow completed the claim. It was rejected on October 19, 1899, the following being found on the face brief of said claim:

Approved for rejection on the ground that, notwithstanding the aid of a special examination, the evidence fails to show satisfactorily that the rheumatism claimed for had its origin in the service and line of duty, it being fairly shown to be due to

an injury received while with Company D, Sixth Massachusetts Volunteer Infantry, in the riot in Baltimore, Md., on the 19th of April, 1861, the War Department reporting that said soldier is not regarded as having been in the military service of the United States in the Sixth Massachusetts Volunteer Infantry.

His widow, Elizabeth, filed her application under the general law on April 21, 1881, claim being rejected on October 19, 1899, in the following terms, to wit:

Approved for rejection on the ground that after special examination the evidence fails to satisfactorily show that the soldier's death from organic heart disease, remote cause rheumatism, was due to the military service in the line of duty, it being fairly shown that the inducing cause of death, rheumatism, resulted from an injury received while with Company D, Sixth Massachusetts Volunteer Infantry, in the riot at Baltimore, Md., on the 19th day of April, 1861, the War Department reporting that said soldier is not regarded as having been in the military service of the United States in said organization.

An appeal was filed on January 8, 1900.

The record in the Adjutant-General's Office at Washington, D. C., shows—

Daniel B. Tyler, a corporal of Company D, Sixth Regiment Massachusetts Volunteers, was enrolled on the 16th day of April, 1861, at Lowell, Mass., for three months, and is reported on muster-in roll of company dated April 22, 1861, as follows: "Not mustered; left at Baltimore." The official list of casualties of the Sixth Massachusetts Volunteers, April 19, 1861, while en route through Baltimore city, furnished by the colonel of said regiment, reports D. B. Tyler: "Condition unknown." "Investigation fails to elicit further information."

The said records further show that the said Daniel B. Tyler, a private in Company M, First Regiment Massachusetts Cavalry Volunteers, was enrolled on the 20th day of September, 1861, for three years, and was discharged on July 13, 1862, under surgeon's certificate of disability for discharge, said certificate reciting that said Tyler was—incapable of performing the duties of a soldier because of chronic inflammation of the liver, caused by a blow from a stone in the Baltimore riot of April 19, 1861. He was discharged from the Massachusetts Sixth about May 16, 1861, but was accepted as a private in the cavalry regiment by Captain Moore, who was detailed to examine his own men (being a physician) by his excellency Governor Andrew.

This certificate is signed by the acting surgeon of the First Massachusetts Cavalry, and dated the 14th day of July, 1862, at Hilton Head, S. C.

The lieutenant of the company stated on said certificate, as follows:

This soldier has not done duty since April 1, 1862, and never since his enlistment has he done full duty, owing to his former occupation of painter, which permanently injured his constitution, as I have been informed by Dr. Holland, surgeon of the regiment.

On April 19, 1899, the Commissioner of Pensions inquired of the War Department—

whether under the law a discharge can not be given to the soldier named herein from Company D, Sixth Massachusetts Volunteer Infantry, to date from May 16, 1861, as per surgeon's certificate of disability, to complete his military record.

The following reply was received:

RECORD AND PENSION OFFICE, WAR DEPARTMENT,

Washington, May 5, 1899.

Respectfully returned to the Commissioner of Pensions. In the absence of any record evidence of the muster into service of Daniel B. Tyler, Company D, Sixth Massachusetts Militia infantry (three months, 1861), he is not regarded by this Department as having been in the military service of the United States in that organization.

By authority of the Secretary of War.

F. C. AINSWORTH, *Chief of Office.*

It is under the above ruling of the War Department that the claims under consideration have been rejected.

It is necessary, in order that the law may be properly applied, to set forth the following facts of history and record:

On the date of the inauguration of President Lincoln, March 4, 1861, at least seven States were in open, armed rebellion against the authority of the Federal Government, said States having, during the preceding months, committed various acts which were treasonable in aim and character. This, taken into consideration in connection with sections 4707, 4712, 4713, and 4728, Revised Statutes, has led the Department, under the law, to hold that March 4, 1861, is to be deemed the date of the commencement of the War of the Rebellion for pensionable purposes. (See opinion in the case of Ellen Pearson, 5 P. D., 258.)

It is not a necessary consequence, however, that all soldiers who enlisted after said date have a pensionable status. On the 4th of March, 1861, the military force of the Federal Government had not been appreciably augmented, and the Army of the United States, proper, consisted only of the regular organization. The attack on Fort Sumter by the State of South Carolina on April 12 and 13, 1861, precipitated matters, and on the night of the 14th of said month President Lincoln issued a proclamation, which will be hereinafter set out, said proclamation being transmitted to the governors of the various States, so far as it was possible, on the next day.

As to matters of record, which will be found in volume 1, Series III, of the Official Records of the War of the Rebellion, it is noted that on April 13, 1861, the adjutant-general of the State of Massachusetts, by direction of the governor of said State, reported to the Secretary of War that the State of Massachusetts had 5,000 militia infantry armed and equipped, and properly officered. On April 14, 1861, President Lincoln issued the proclamation hereinbefore referred to, the essential part of which, so far as it affects this case, is as follows:

Now, therefore, I, Abraham Lincoln, President of the United States, in virtue of the power in me vested by the Constitution and the laws, have thought fit to call forth and hereby do call forth, the militia of the several States of the Union, to the aggregate number of 75,000, in order to suppress said combination, and to cause the laws to be duly executed.

The details of this object will be immediately communicated to the State authorities through the War Department.

Accompanying this proclamation, when it was forwarded to the governors of the several States, was a communication from the Secretary of War, a partial quotation therefrom being as follows:

WAR DEPARTMENT,
Washington, April 15, 1861.

SIR: Under the act of Congress "for calling the militia to execute the laws of the Union, suppressing insurrection, repel invasions," etc., approved February 28, 1795, I have the honor to request your excellency to cause to be immediately detached from the militia of your State the quota designated in the table below, to serve as infantry or riflemen, for the period of three months, unless sooner discharged.

Your excellency will please communicate to me the time at or about which your quota will be expected at its rendezvous, as it will be met as soon as practicable by an officer or officers to muster it into the service and pay of the United States.

The quota from Massachusetts, according to the table mentioned, was two regiments, to consist of 74 officers and 1,486 men. The proclamation was received by Governor Andrew on the 15th of April, and on said date he telegraphed as follows:

Boston, April 15, 1861.

Adjutant-General L. THOMAS,
Washington:

Despatch received. By what route shall we send?

JOHN A. ANDREW.

The response was:

ADJUTANT-GENERAL'S OFFICE,
Washington, April 15, 1861.

Governor JOHN A. ANDREW,
Boston, Mass.:

Send your companies here by railroad.

IRVIN McDOWELL,
Assistant Adjutant-General.

On this same date Governor Andrew advised the Secretary of War, among other things, as follows:

I have received telegram from yourself and Adjutant-General Thomas, admonishing me of a coming requisition for twenty companies of 64 privates each, and I have caused orders to be distributed to bring the men to Boston before to-morrow night to await orders.

On the following day Gen. Winfield Scott telegraphed as follows:

WASHINGTON, D. C., April 16, 1861.

His excellency the GOVERNOR OF MASSACHUSETTS,
Boston, Mass.:

Send first regiment which is ready by rail here.

And on the same day the following telegram was sent by General Scott:

WASHINGTON, D. C., April 16, 1861.

His excellency the GOVERNOR OF MASSACHUSETTS,
Boston, Mass.:

We will muster your regiments after arrival. Send the first ready by rail to this place.

It is a well-known historical fact that on the 16th and 17th of April, 1861, the various military companies in Boston and neighboring cities which made up the organization known as the Old Sixth Massachusetts Volunteers rendezvoused on Boston Common.

On April 17, 1861, Governor Andrew telegraphed the Secretary of War as follows:

One regiment starts at 6 by rail for Washington.

And on the 18th Governor Andrew advised the Secretary of War, among other things, that—

Last evening half a regiment left via Fall River for Fort Monroe, to be taken by steamer from Fall River. This morning the other half left by steamer *Spaulding*. Last evening Colonel Jones's regiment left by Worcester Railroad for Washington.

The organization referred to in Governor Andrew's advice as "Colonel Jones's regiment" was the Sixth Massachusetts Volunteers, and the one in which the soldier herein mentioned was enrolled.

The material issue in this case is as to whether or not this soldier has a pensionable status as a corporal in Company D, Sixth Massachusetts Volunteers, and the fundamental law applicable thereto is section 4693, Revised Statutes, the first subdivision of which is as follows, and refers to the persons entitled as beneficiaries under the preceding section:

First. Any officer of the Army, including regulars, volunteers, and militia, or any officer in the Navy or Marine Corps, or any enlisted man, however employed, in the military or naval service of the United States, or its Marine Corps, whether regularly mustered or not, disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States and in the line of duty.

An exhaustive discussion of the scope of this section of the Revised Statutes was had in the opinion in the case of *Randolph M. Manley* (5 P. D., 295), it being therein held that said section included, for pensionable purposes, all officers and enlisted men who were in the military service of the United States, and that the terms of the statute expressly included an enlisted man in the militia, provided he was in the United States military service. This opinion received the sanction of the Assistant Attorney-General for the Department of the Interior, and also of the Attorney-General of the United States (20 Op. Att. Gen., 322).

While the *Manley* case and the one under discussion are not identical at all points, yet there is much in common to them both. It is demonstrated in said opinion that the President of the United States has the power to call the militia of the several States into the service of the United States, and that a requisition calling forth the militia is, in legal intendment, an order, and must be so interpreted. For the soundness of this view reference is made to the opinions of the Supreme Court of the United States in the cases of *Martin v. Mott*

(12 Wheat., 19) and *Houston v. Moore* (5 Wheat., 37); see also *Story* on the Constitution of the United States, section 1212. That President Lincoln did call forth the militia of the State of Massachusetts into the service of the United States by his proclamation of April 15, 1861, can not, under the facts herein set forth, be denied; neither can it be denied that the Sixth Massachusetts Volunteers responded to the call, and that the said Massachusetts regiment was assaulted by a mob while en route from Boston to Washington, while obeying the orders of the governor of Massachusetts, the said orders of the said governor being in obedience to the orders of his superior officer, the President of the United States, and the Commander in Chief of the military and naval forces of the United States. The facts unqualifiedly show that the soldier herein was a member of the State militia of Massachusetts, and when in Baltimore, on the 19th day of April, he was there pursuant to the orders of the President of the United States.

All of the above being true, he has a pensionable status under the general law unless barred therefrom by some other law. That he was not mustered into the service of the United States as a member of Company D, Sixth Massachusetts Volunteers, is admitted; but such fact is of no special moment, for the subdivision of section 4693, Revised Statutes, quoted herein, expressly states that muster in is not essential to create a pensionable status. That muster in is not essential is conclusively demonstrated in the opinion in the *Manley* case, *supra*, as well as in the opinion in the case of *James L. Hicks* (8 P. D., 518), wherein it is held:

Provided that the said militia or military organization was called into the service by the President, said organization was then a part of the Federal Army, and the soldier who was a member of such organization is entitled to the same benefits of the pension laws as though he were regularly mustered.

It is interesting to note, in view of the holding of the War Department in the case at bar, the opinion of the Acting Judge-Advocate-General of the Army, dated January 23, 1890, and addressed to the Commissioner of Pensions, wherein he says:

In the case of a militia organization it is not absolutely necessary that there should be this formality (muster) in order to place it in the actual service of the United States. There seems to be good reason for this. The volunteer, before his muster in, has not bound himself to any service; the militiaman is already enrolled in the service of the State, and is simply transferred for a certain time and for a certain purpose to that of the United States. * * * It might be that in a case of great emergency no formal muster in could be had, but that the militia were, nevertheless, received by the authorities of the United States, placed under the command of its officers, and used for its purpose. It could hardly be held that they were not in the service of the United States because this formality had not been complied with. So I am of the opinion that this requirement of the act of 1862 should properly be regarded as directory only, and that in the case under consideration the fact that there was no muster in would not, of itself, absolutely preclude its being held that the Thirteenth Regiment Pennsylvania Militia was in the actual service of the United States.

It is thus seen that the present holding of the War Department is directly contrary and antagonistic to the ruling of the same Department upon the same identical question, after a space of ten years.

The War Department, not deeming Tyler to have been in the United States service while a member of the Sixth Massachusetts Volunteers, because of a lack of muster in, and a consequent inability to be mustered out, refused to discharge him of record.

This Department knows of no law affecting the pensionable status of a soldier under section 4693 of the Revised Statutes, which requires him to have been actually discharged, and of record, by the War Department. If a soldier was killed in battle a record of regular discharge by the War Department certainly could not be produced; yet, nevertheless, his dependent relative would be entitled to pension, other necessary facts being shown; and the title of such dependent relative is unquestionably based upon the title of the soldier, as will readily be seen by reading section 4702, Revised Statutes, in connection with section 4693, Revised Statutes.

Unlike many of the acts of Congress, section 4693, Revised Statutes, as well as other sections and acts explanatory and amendatory thereto and which bear upon the pensionable status of the soldier under the general law, does not in terms make an honorable discharge necessary. Neither is it apparent, by inference or presumption, that Congress meant to deny a pensionable status under the general law if a soldier was not actually personally discharged; that is, formally mustered out, or presented with a paper showing upon its face that he was "discharged."

It is necessary that one legally terminate his military service before he can be accorded a pensionable status for such service under the general law, for the very plain reason that if his military service has not terminated he is still in the service, and the law denies him a pension while in the service. Because, however, a legal termination of service is an essential prerequisite in such a case, it does not necessarily or logically follow that there can be no legal termination of the service in the absence of a specific discharge by the War Department. A reference to the opinion in the case of Manley shows that some of the Pennsylvania militia regiments mentioned therein were never discharged or mustered out by the War Department, and yet it was consistently held, the reason for such holding being fully set forth, that the services of the members of these organizations had been legally terminated. It is admitted in the Pennsylvania cases mentioned that the soldiers were discharged by the governor of the State of Pennsylvania, but this was not a discharge by the War Department, nor, most important of all, was it a discharge from the military service of the United States; and if said Department was now requested to discharge these Pennsylvania men its answer, in order to be consistent with its ruling in the case at bar,

would have to be, and undoubtedly would be, that it would not discharge them, because it had never mustered them in. Upon this point, then, it would seem that the particular principle involved was the same in the Manley case as is now involved in the one under discussion.

It is true that in certain departmental decisions it has been held that one must be "discharged" from the service before a pensionable status can be admitted under the general law; but a very careful review of said decisions demonstrates conclusively that the true meaning of the word "discharged," as therein used, is a legal termination of service, and not a discharge as evidenced by some writing of a United States military officer, or of a record that he was "discharged." Actual discharge is a fact, the discharge certificate or the record being but evidence of such fact. That these statements are true is clear from the following:

Most of the cases wherein this issue is discussed are those in which desertion is the issue, and the two leading cases, which practically cover the entire ground, are those of John Norton (9 P. D., 382) and Patrick H. Burns (11 P. D., 332). In both of these cases an opinion of Attorney-General Taft is quoted, and said departmental decisions, so far as the point under discussion is concerned, are practically based upon said opinions, the essential portion of which is as follows:

That the contract of enlistment must in all cases, even in that of desertion, be regarded as having expired when the last day of the term of enlistment therein fixed has elapsed.

And again, as shown in said decisions, the War Department holds that although a man enlisted in his second service while in desertion from a prior service, yet, if the United States does not avoid the second enlistment before its expiration, it becomes a legal term of service.

The conclusion is irresistible that the War Department holds, and Attorney-General Taft held, that a soldier's term of enlistment legally terminates on the date on which his contract of enlistment expires.

And further, upon the same issue: Section 4701, Revised Statutes, provides that in determining the length of the soldier's service it shall, in certain cases, be lawful to continue the length of service up to the date of the disbandment of the organization of which the soldier was a member. A strong argument could certainly be built on the proposition that the section referred to is good authority for holding a soldier's service to have been legally terminated, other necessary facts being proved, on the date on which said organization was disbanded. For, if the statutes fix a date beyond which a soldier's service can not be said to continue, it would seem to logically follow that such date must be the date of the termination of said service. It is not deemed necessary, however, to rely upon any inference which may legitimately be drawn from the wording of section 4701, Revised Statutes, for the

Supreme Court of the United States has passed upon the principle involved in such a manner as to practically dispose of the question.

James H. North, an officer in the Navy of the United States from May 29, 1829, to January 4, 1861, brought suit against the United States in the Court of Claims for three months' extra pay, as provided by the act of July 19, 1848, chapter 104, section 5 (9 Stat., 248), the essential part of which is as follows:

That the officers, noncommissioned officers, musicians, and privates engaged in the military service of the United States in the war with Mexico, and who served out the time of their engagement, or may have been honorably discharged, * * * shall be entitled to receive three months' extra pay.

North recovered judgment, and the Government appealed. Mr. Chief Justice Waite, in delivering the opinion of the court, said:

The answer to the second question is, to our mind, attended with no great difficulty. Those of the Regular Army or Navy who were "engaged in the military service of the United States in the war with Mexico" may be said to "have served out the term of their engagement," or to have been "honorably discharged," within the meaning of those terms as used in the act of 1848, when the war was over, or when they were ordered or mustered out of that service. Being in the Army and Navy, their "engagement" was to serve wherever they were ordered for duty. Their engagement to serve in the war with Mexico ended when they were taken away from that service by proper authorities. (U. S. v. North, 112 U. S., 510.)

Here is a statute which required one to be "honorably discharged," and the Supreme Court of the United States held that when the war with Mexico was over one who was engaged in the military service of the United States in the war with Mexico may be said to have been "honorably discharged," when, as a matter of fact, he never was actually discharged from such service—that is, he was never mustered out from such service; never received any certificate of discharge from the War Department from such service, and there is no record that he ever was discharged from such service.

Applying the principles laid down by the Supreme Court in the case at bar, it would appear that when Tyler had served out his term of engagement under his said enlistment, said enlistment contract terminating on July 16, 1861, he can and must be considered as having been discharged from such engagement. That said engagement terminated by operation of law at the close of the war of the rebellion is also apparent from the ruling of the Supreme Court in the North case.

The distinction, then, seemingly drawn between the discharge of a soldier and the legal termination of his service, appears to be unwarranted and illegal in this case.

In view of the foregoing facts and statements of law, the Department holds that Daniel B. Tyler, a corporal in Company D, Sixth Massachusetts Volunteers, was on the 19th day of April, 1861, a member of the State militia of Massachusetts, and while he, with said regiment, was marching through the streets of Baltimore on said day

he was a member of an organization which was a part of the military forces of the United States, said organization having been called into the military service of the United States by the order of the President, lawfully issued; that his contract of enlistment as a member of said organization was legally terminated; that he may be considered as having been discharged from such enlistment, and that he has a pensionable status as a member of said militia under the first subdivision of section 4693, R. S.

Inasmuch as the basis of the rejection of these claims has been shown to be an unsound legal proposition, the merits of the cases will not now be discussed. The action in both of these cases is reversed, and the claims must be reopened and readjudicated upon their merits and in conformity with the law as herein set forth.

Actions reversed.

REIMBURSEMENT—FRAUD AND MISTAKE—EVIDENCE.

ADELBERT L. ORR.

The evidence fails to show that claimant had rheumatism prior to his entry in the service, or that he contracted said disease during said service, and in the absence of fraud on the part of the claimant the action of the Bureau in withholding payments to reimburse the Government was erroneous.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 3, 1902.*

Adelbert L. Orr, formerly private unassigned, Maine Volunteer Infantry, was drawing a pension at the rate of \$72 per month under the general law, for disability due to disease of the lungs and throat, resulting from measles, malarial fever, and rheumatism and resulting disease of heart, but the rate of said pension was reduced in March, 1898, to \$30 per month, the pension on account of rheumatism and resulting disease of heart being terminated on the ground that the rheumatism existed before enlistment. The pension for disease of throat and lungs was continued at \$30 per month, but payments thereunder were ordered withheld until the amount erroneously paid on account of rheumatism and disease of heart should be recovered. From this action the claimant filed an appeal to the Department, June 16, 1898, and on June 30, 1898, the action of the Bureau was affirmed. June 10, 1899, a number of affidavits were filed with a view to reopening the claim, but on October 6, 1899, the former action was adhered to, the evidence not being considered material for the purpose of reopening the claim.

June 18, 1902, the claimant filed an appeal to the Department, alleging that the Bureau was in error in its consideration of the evidence submitted for reopening the claim, and contending that the whole of

the evidence will sustain the right of claimant to the pension for rheumatism and results.

This appeal raises the whole record for review, and it is a voluminous one, with an exceptional number of affidavits, besides three special examiners' reports, two of them very exhaustive. The issue is of a double nature, being as to whether the claimant contracted rheumatism during his military service, and whether in filing and prosecuting his claim therefor he was guilty of fraud, thus giving the Government the right to reimbursement for payments made thereunder.

The record discloses that the soldier enlisted March 27, 1865, and was discharged May 17, 1865. The medical records show the following:

Private Adelbert L. Orr, unassigned recruit, was admitted to Cony General Hospital, Augusta, Me., April 16, 1865, from Coburn, with fever, and returned to duty June 5, 1865. No records of Camp Coburn, Augusta, Me., on file.

In his original declaration, filed February 26, 1880, the claimant made the following allegations:

That while in the service aforesaid, and in the line of his duty, he received the following disability: Contracted a severe cold while engaged in digging a well at Camp Coburn, Augusta, Me., about the 1st of April, 1865, which settled on him, resulting in a series of fevers; while suffering with the same he had an attack of measles; that said diseases produced great debility and a complete derangement of the whole system and heart troubles of a neuralgic nature; that during his severe sickness as above, and for a long time after the fever abated, he had no control of his bowels and was completely prostrated in body and mind; that he did not have his senses while under treatment in Ward No. 8, Cony United States General Hospital, Augusta, for four weeks; that he had been followed continuously since his discharge by said disability, and has not been able to perform any hard manual labor by reason thereof; that for one year immediately subsequent to his discharge he was unable to perform any labor whatever. * * *

This claim was adjudicated September 29, 1884, and \$4 per month granted to date from May 18, 1865, for "disease of lungs and throat from measles and malarial fever." Before the adjudication, on March 27, 1882, the claimant filed the following affidavit:

I further state that the disability for which I claim pension arises from a severe cold which was contracted at Augusta, in said State, while in the line of duty; this cold was accompanied with a pain in my left side and through the lower part of my back; this was immediately followed by a sickness, and for about four weeks I was unconscious; I was then informed that I had the lung fever, brain fever, and measles; this pain in side and back continued up to my discharge and ever since. I continued in said Cony hospital until my discharge. From my said discharge to the present time I have received the following medical treatment: Dr. G. Hopkins from July, 1865, to summer of 1867 (Dr. Hopkins is dead); Dr. A. P. Folsom from 1867 to 1876; Dr. — Spiller from 1876 to 1878; Dr. James N. Norcross from 1878 to this time. They each treated me for rheumatism and affection of kidneys, liver, spleen, and heart. I remained at said hospital a short time after my discharge, being in a weakened state and unable to go home; my said sickness was followed by rheumatism and affections of the above-named organs.

On the adjudication of the claim rheumatism was not accepted as a result of the fever or measles.

On January 21, 1885, a claim for increase was filed in which the following allegations were made:

That he believes himself to be entitled to an increase of pension on account of an increase of the disability for which already pensioned and because his condition arising from severe cold, fevers, and measles, such as the derangement of his whole system, heart, troubles of a neuralgic nature—or rheumatism affecting the heart—and weakness of bowels, as alleged in his original declaration for pension, was such as to almost totally disqualify him for manual labor at the time his original pension was granted and to entitle him to a higher rate in his opinion from his discharge.

The claim was adjudicated August 28, 1885, and \$12 per month was granted from June 17, 1885, and rheumatism and resulting disease of heart was included in the certificate. Under successive claims for increase, ratings of \$16, \$30, and \$72 per month were granted, the last named rate being granted to date from March 4, 1890. This pension was drawn until March, 1898, when pension was reduced as above stated.

The reduction took place after due notice and thorough special examinations. In August, 1896, a special examiner submitted the sworn statements of five witnesses who stated at the time the claimant enlisted he was "limping around" with a sore knee.

Clement D. Hinckley testified that he knew claimant well before his enlistment and that he was lame in one knee; he was lame by spells, limped at times. This witness knew nothing of rheumatism; had heard that the knee was injured when claimant had fallen from a fence. He worked with claimant on the river after his return from the service and he appeared to be a well man except for the lameness of one knee.

George W. Brown testified that he knew claimant before the war; that for about five years before he enlisted he was lame by spells and he said he supposed the lameness was caused by rheumatism; he was lame in one of his knees; by spells the lameness continued up to his enlistment; after discharge the witness saw claimant and worked with him and he had no ailment aside from the lameness of the knee which was the same as before enlistment.

Joseph D. Hinkley testified that he worked with claimant prior to 1862 and that "by spells" he was lame in one knee; he did not know what caused the lameness; after his return from the service the claimant was seen by witness, and the latter worked with him and he appeared healthy and had no disability except lameness of one knee.

John Bowley testified that he went with claimant to Bangor, Me., to enlist but claimant was rejected because of "narrowness of chest." He had a lame leg before he enlisted; the witness understood that the claimant was injured in some way and was lame in consequence thereof. He limped at times before his enlistment. He was not well at discharge, but soon after he went to work and worked for many years, with no disability except lameness in one knee.

Henry Hinckley testified that prior to enlistment claimant had a lame knee. He knew of the lameness in 1862; he did not know what caused the lameness; whether it was from an injury or not. After discharge the claimant continued to suffer with the lame knee, but had nothing else the matter with him.

At a subsequent examination the above witnesses adhered to the statements as made above.

John Dority testified that claimant was lame before enlistment, the result of an injury in falling from a fence; the claimant walked lame before his enlistment.

Mrs. Laurance K. Hinckley testified that she knew that her son and claimant were first rejected at Bangor on applying for enlistment; her son was rejected because of a wound, and the claimant on account of lameness of one knee; claimant was lame by spells before his enlistment, and was lame in the same way afterwards.

B. F. Walker testified that claimant "went lame" some time before his enlistment, but he did not know the cause; he was lame after his discharge from the service.

The above sets out substantially all the evidence on the question of the existence of rheumatism prior to claimant's enlistment. The claimant and his mother both testify that soldier's right knee was injured when he was about nine years of age, but that he had recovered from that injury and was not lame at or prior to his enlistment for many years.

It is manifest that the above evidence fails to establish that claimant had rheumatism prior to his enlistment. But one witness testified that claimant even supposed he had rheumatism. The evidence establishes, or tends to establish, that claimant received some kind of an injury to one of his knees and as a result thereof he was lame. Lameness alone is no evidence of rheumatism, and the evidence as to the injury lends further strength to the conclusion that rheumatism did not exist at date of claimant's enlistment.

This disposes of one of the issues of the appeal. If claimant did not have, or if he did not know he had rheumatism at enlistment he could not be chargeable with fraud in alleging said disease as of service origin.

The remaining question in issue is whether the evidence shows, as a matter of fact, that claimant contracted rheumatism during his military service, and if such a case is presented as authorized the Bureau in reducing the rate of pension granted claimant from \$72 to \$30 per month and changing the pension certificate so as to exclude rheumatism and results. This will require an examination of the evidence filed in support of the claim for rheumatism.

July 24, 1885, the affidavit of William O. Burnham was filed in the claim, in which he stated he was in hospital when claimant was there

during the service, and that claimant was sick with lung fever, measles, and rheumatism. He was so ill that he could not be moved without yelling with pain. He also testified that he had been lame ever since.

On cross-examination this witness testified that he did not know claimant before enlistment and had seen him but once since his discharge. He declared he did not know that claimant had rheumatism when he was in the hospital, and neither did he have personal knowledge that he had lung fever and measles. All he knew about it was what claimant's mother told him.

Levi R. Gray and John Bowley made a joint affidavit in 1883 that soldier was sound at enlistment, and that at and since discharge he has been sick and feeble with what they understood was "neuralgic or rheumatic affection of the heart and a generally debilitated condition of the whole system."

We have seen that John Bowley utterly repudiated his affidavit on cross-examination, and Levi R. Gray testified that he saw claimant in the hospital in May, 1865, and he saw claimant sick with the measles, he knew nothing of lung trouble or rheumatism; he worked with claimant a number of years after his discharge, and he was then healthy and complained of no disability. This witness declared that he never signed the joint affidavit, that the signature was a forgery, and that he never authorized any statement in it.

Charles O. Bates made affidavit in 1884 that he worked with claimant before enlistment and knew of no disability, and since discharge claimant had been a continuous sufferer from rheumatism and disease of heart.

On cross-examination this witness declared he only had a casual acquaintance with claimant before his enlistment, and did not know whether he was disabled or not. He did not see claimant until sometime after his discharge. He did not recollect ever having made an affidavit in the case, and failed to confirm any of the statements contained in it.

B. F. Walker made affidavit, in 1885, that he knew claimant was free from rheumatism at enlistment, but after he was discharged he knew he was sick and lame from rheumatism.

We have seen that this witness stated on cross-examination that claimant "went lame" before his enlistment. When his attention was called to his affidavit, claimant said:

I have heard that affidavit read. I know, notwithstanding that affidavit, that claimant was not rugged before he enlisted; I know that he was lame before he enlisted; his lameness increased, though, after the war. I can't say I have seen him frequently.

William Irving made affidavit in 1885 to the same effect as the one of Walker, but he died before the special examination was conducted.

In 1885 George A. Potter made affidavit that he knew claimant before his enlistment, and that he was free from rheumatism or any

lameness, and since his discharge he has been suffering continuously with said diseases.

On cross-examination he declared that he knew of no disability claimant had before enlistment. He had personal knowledge that claimant has had rheumatism since 1878.

Gilman H. Davis made affidavit in 1885 that claimant was sound at enlistment, and since discharge has been so lame as to unable to work most of the time.

On cross-examination the above affiant declared he had no personal knowledge of claimant's condition before enlistment, but for several years after discharge he was in good health, when he began to complain of rheumatism. He denied that his affidavit was true in any respect.

March 2, 1882, Dr. J. N. Norcross made the following affidavit:

That he has been acquainted with said soldier for about sixteen years, and that he commenced to treat him about the 1st of June, 1866, and has treated him more or less ever since; treated him for rheumatism and heart disease at the first attendance and the several other times since; he has been troubled more or less during all of this time with inflammation of the kidneys. This disease of the heart being continuous, he is unable to perform any manual labor and slight cold or exertion aggravates his diseases, making it necessary to call a physician from time to time.

Before the special examiner the doctor stated that the date "June 1, 1866," given in his affidavit was an error. He testified that he did not move to claimant's locality until 1876, so his treatment of him could not have begun before the last-named year.

In 1882 Dr. Whitney Spiller made affidavit that from 1875 to 1878 he treated claimant for chronic inflammation of the liver and acute inflammation of the spleen, with a torpid condition of the liver, and since 1878 he had treated claimant for the same troubles and "also for chronic rheumatism."

The above affiant was dead when the special examination was conducted.

In 1880 Dr. A. P. Folsom made the following affidavit:

I have been acquainted with Mr. Adelbert L. Orr for the past eighteen years. I have prescribed for him every year for the past thirteen years; he did not complain of any trouble to me prior to 1867; he is unable to perform physical labor; his disease is neuralgic affection of the heart.

The above affiant was dead when the special examination was conducted.

Melville M. Folsom made affidavit in 1885 that since 1865 he had filled prescriptions as a druggist for rheumatism, and a rubber cap for the knee. It is presumed that these were for claimant, although the affiant did not so state.

On cross-examination the above affiant declared he did not know when claimant first had rheumatism, but refused to answer questions or sign his statement.

In 1885 Dr. O. S. Pease made affidavit that he had treated claimant for "rheumatic arthritis, especially of the knee joint," for five years. This affiant was dead when the special examination was held.

The first medical certificate in the case was made March 22, 1882, and is as follows:

Height, 5 feet 4 inches; weight, 145 pounds; age, 34; pulse rate, 72; respiration, 18. Says in March, 1865, at Augusta, Me., had measles and lung and brain fever; did not labor for a year afterwards; has had rheumatism in right leg and left arm and shoulder ever since; has had cough most of the time; right knee is sometimes tender; has pain in head and back much of the time; sometimes passes urine frequently. We do not discover any pathological evidences of disability, and do not rate.

On February 14, 1883, another medical certificate was made, which is as follows:

He complains, as a result of measles, lung and brain fever, pains in cardiac region and palpitations of pains and lameness across upper part of back, shoulders and arms, and back of neck. Heart, size and sounds normal. (Smokes.) Liver and spleen normal. Loins not tender; no crepitus of any joint; raises arms above shoulders slowly and slightly. Tongue coated. Pterygium of right eye; no cough or other evidence of pulmonary disease. The stiffness in raising the arms is the only evidence of disease, and we do not connect that with measles, which we think the only disease he had.

The medical certificate of 1884 found some evidences of articular rheumatism, especially of right knee.

Turning now to the evidence as to existence of rheumatism in the service, a careful examination of the record fails to disclose any testimony regarding said disease, whatever. Even the claimant's mother did not remember that he had any evidences of rheumatism about him in the service, at discharge, or afterwards for some time.

The records kept by the clerk in the boom where Mr. Orr worked during the years from 1867 to 1871 show that he received the largest wages paid for the kind of work he did, rafting logs.

A dozen witnesses, who had opportunities for knowing, testified that for many years after his discharge claimant had no disability save lameness of one knee, which has been shown existed before enlistment; that we worked in the woods and on the river continuously, and made a full hand. The claimant, himself, acknowledges that he did work, but was able to do so only with great pain.

As the evidence has been set out above, it clearly appears that the case that was built up by affidavits, on which the claim for rheumatism was based, was utterly destroyed on cross-examination. It will be noted that prior to 1876 there is no medical evidence of the existence of rheumatism, and the medical certificates of 1882 and 1883 failed to show any such disease. In short, there is not sufficient evidence in the claim, when it is all considered. The evidence on which the claim was allowed in the first place may have warranted placing claimant's name on the rolls for rheumatism, but when all this evidence was

shown to have been without personal knowledge on the part of affiants, or to have been positively erroneous, together with the fact that Dr. Norcross made a mistake of ten years in the period of the treatment of claimant for rheumatism, there was nothing left upon which to rest a claim of title to pension.

The Bureau has an undoubted right, when it finds out such an error as this, to cease to perpetuate that error by continuing a pensioner's name on the rolls. When the evidence which supported title is found to be worthless the title falls, as a matter of course.

It is immaterial that the claimant had a short service. The material inquiry is, Did he during that service contract rheumatism? The evidence now in the case does not so show. It not only does not show that the claimant contracted rheumatism in the service, but it also fails to show that he suffered from said disease at discharge or afterwards for over ten years.

Therefore the action of the Bureau is reversed, in so far as reimbursement is concerned, and the papers are returned with instructions to pay claimant \$30 per month from date of dropping his name from the rolls on account of rheumatism and results, up and to the allowance of the \$72 rating by special act of Congress.

The facts in this case show that this claimant was in receipt of a pension for years, a large portion of which, as a matter of fact, he had no title to, but under the law that which he has received can not be recovered by the Government. The evidence on which the claim was allowed should have been properly tested by cross-examination in 1885, but it being then accepted as sufficient, though since shown totally insufficient, the Government must be the loser.

**DEPENDENT PARENTS—SECTION 4707 OF THE REVISED STATUTES—
STATUTORY CONSTRUCTION.**

DAVID DYER (FATHER).

A dependent father has no pensionable status, under section 4707, Revised Statutes, while the mother of the soldier is living.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 12, 1902.*

David Dyer, as dependent father of Clarence Dyer, formerly a private in Company H, Sixth United States Cavalry, filed his declaration under the general law, on December 29, 1898, claim being rejected on February 19, 1900, on the ground that as soldier's mother was still alive the claimant had no pensionable status. An appeal was filed on March 10, 1900.

This appeal is based upon the contention that the soldier did not leave—

any dependent mother, but on the other hand, left a dependent father, and a mother still living, but not dependent. Then the question arises, did Congress in cases like this intend to bar a dependent father, simply because he had a mother living who was not dependent? We think not, as same would be class legislation and give some dependent fathers pension and refuse other dependent fathers whose claims might be more meritorious than the ones pensioned. Such a construction upon this section is harsh, unjust, technical, and unfair.

This appeal involves a construction of section 4707 of the Revised Statutes, so far as the rights of a dependent father are concerned. Said section, after reciting certain conditions, among them being one that the soldier did not leave a widow or legitimate child, says:

But has left or shall leave other relative or relatives who were dependent upon him for support in whole or in part at the date of his death, such relative or relatives shall be entitled, in the following order of precedence, to receive the same pension as such person would have been entitled to had he been totally disabled, to commence from the death of such person, namely: First, the mother; secondly, the father; * * * *Provided*, That if in any case said person shall have left father and mother who are dependent upon him, then, on the death of the mother, the father shall become entitled to the pension, commencing from and after the death of the mother; and upon the death of the mother and father, or upon the death of the father and remarriage of the mother, the dependent brothers and sisters.

This statute, in clear and unambiguous terms, provides, in the absence of a widow or legitimate child, that the pension shall first be paid to the dependent mother; and upon her death to the father, and upon the death of the father and remarriage of the mother the pension shall go to the dependent brothers and sisters. Words could not be plainer, and it only remains to discover as to whether or not, a condition having arisen not mentioned in the statute, the father can succeed to the right to the pension before the death of the mother.

That a pension is a grant of the public funds by Congress of the United States can not be successfully denied. No one has a natural or inherent right to a pension, and the right to one does not exist under the common law; it is a statutory grant, and a right to a pension arises wholly and only by reason of the statute. Mr. Sutherland, in his work on Statutory Construction, section 378, says, in relation to public grants of titles, franchises and property:

The words of a private grant are taken most strongly against the grantor, though if the meaning can not be discovered the instrument is void. But this rule is reversed in cases of public grants. They are construed strictly in favor of the Government on grounds of public policy. If the meaning of the words be doubtful in a grant designed to be of general benefit to the public they will be taken most strongly against the grantee and for the Government, and therefore should not be extended by implication in favor of the former beyond the natural and obvious meaning of the words employed.

Any ambiguity in the terms must operate in favor of the Government. Whatever is not unequivocally granted is taken to be withheld. Whether the grant be of

property, franchises, or privileges it is construed strictly in favor of the public. Nothing passes but what is granted in clear and explicit terms.

In the case of *Martin v. Waddell* (16 Pet., 367) Chief Justice Taney, in discussing the rights passing under a grant by the sovereign, said:

In such cases whatever does not pass by the grant still remains in the Crown. * * * Grants of that description are, therefore, construed strictly, and it will not be presumed that he intended to part with any of the public domain unless clear and especial words are used to denote it.

In the case of *Holyoke Company v. Lyman* (15 Wall., 500) the Supreme Court, in considering what rights passed to the Holyoke Company by virtue of certain powers granted it by the legislature of the State of Massachusetts, said:

Repeated decisions of this court have established the rule that whenever privileges are granted to a corporation and the grant comes under the revision of the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and explicit terms. Whatever is not unequivocally granted in such acts is taken to be withheld.

And this, while admitting that the Holyoke Company had vested rights under the grants.

The same court said, in the *Binghamton Bridge* case (3 Wall., 51):

In the case of the *Charles River Bridge* the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized that charters are to be construed most favorably to the State, and that in grants by the public nothing passes by implication. * * * The principle is this: That all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption.

This *Binghamton Bridge* case was also one involving the question of vested rights.

In *Mills v. St. Clair Company* (8 How., 581), the Supreme Court said, in discussing an act of the legislature of Illinois granting certain rights and privileges to one Wiggins:

We deem this general principle not open to controversy; and in regard to so much of the controversy as involves the contract itself, no material difficulty exists as to what principles of law should govern. * * * First, that in a grant like this, designed by the sovereign, making it to be a general benefit and accommodation to the public, the rule is that if the meaning of the words be doubtful they shall be taken most strongly against the grantee and for the Government; and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if these do not support the claim it must fall. Such is the established doctrine of the court, as was held in the case of *The Charles River Bridge v. The Warren Bridge* (11 Peters, 544-547).

See also, to the same effect, the case of *The Richmond, etc. Railroad Company v. The Louisa Railroad Company* (13 How., 71).

It would seem from the cited cases to be the well settled and established doctrine that a public grant of property or franchise to a corporation, person, or persons, can not be enlarged in any particular

beyond the terms and words of the statute, taken in their natural and obvious meaning. If it should be argued, however, that the principle set forth has only to do with granted rights, and does not affect the person or classes who claim under a statute, such a contention will not only be found to be fallacious in the extreme, but it will also be found under the rules of construction of laws affecting public grants that the principle is the same as it relates to the persons enumerated and the rights therein bestowed.

Mr. Sutherland states, in section 325, Statutory Construction, in regard to the maxim "*Expressio unius est exclusio alterius*"—the expression of one thing is the exclusion of another:

This maxim is applicable to a statutory provision which grants originally a power or right. In such cases the power or right originates with the statute, and exists only to the extent plainly granted; the right while inchoate and the power so far as not exercised cease if the statute be repealed, and if the statute provides the mode in which they shall be exercised the mode must be pursued and no other. This conclusion is almost self-evident; for since the statute creates and regulates there is no ground for claiming or proceeding except according to it.

It is immaterial whether the grant be that of public lands, rights or franchises inherent in the public, public moneys or any other species of property belonging to and vested in the public; and it is equally of no moment whether the grantee be a corporation, person, or persons. The principle is the same. The grant takes something from the public, and such a grant can only be claimed under the statute, and by such persons as are clearly designated by the statute, and then only according to the clear letter of the statute. The rights under such a statute, and the person or class of persons affected, can not be enlarged "beyond the natural and obvious meaning of the words employed," and under the statute the "rights asserted against the State must be clearly defined, and not raised by inference or presumption."

It is often insisted by claimants and their attorneys, both in the adjudication of pension claims and in appeals, that they are being deprived of some right. They proceed upon a theory or proposition that the Commissioner of Pensions is the disbursing officer of a large fund of money which he is to distribute among disabled soldiers or their dependent relatives, and if the soldier has served his country faithfully and his claim is not allowed, that they are being unjustly and unlawfully dealt with. The fact that one has served his country faithfully as a soldier does not, per se, prove up a right to a pension. No one has a pensionable status unless his claim is proved under some statute which expressly bestows a status upon him and grants him a right. All officers of the Government who are employed in passing upon pension matters are hedged about by the laws relating to pensions, and can not pass favorably upon a claim unless the claimant is clearly within some statute which grants him a status and a right to such pension. The question is not in the present case as to whether Congress

in cases like this intends to bar a dependent father simply because soldier had a mother living who is not dependent. This claimant can not be barred of his right for the simple reason that he never had a right, as claimed. The statute as regards the status of an alleged dependent father is clear and unambiguous. He has no right whatever during the lifetime of the mother, and this solely for the reason that the statute does not grant him any right. His right is not barred by implication, inference, or presumption; but he is denied a status for the very cogent reason that the statute, so long as the mother of the soldier is living, does not give him a status.

The claimant not having any status in the law, his claim was legally rejected.

Action affirmed.

ACCRUED PENSION—ACT OF MARCH 2, 1895.

WILLIAM LAKE (DECEASED).

The act of March 2, 1895, provides that from and after September 28, 1892, if no widow or child survive the pensioner, no payment whatsoever of accrued pension shall be made or allowed except so much as may be necessary to reimburse the person who bore the expense of his last sickness and burial, and expressly repeals the provision of the act of March 1, 1889, under which this claim for accrued pension is made.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 12, 1902.

William Lake, late a private in Company F, One hundred and fifth New York Volunteer Infantry, was on September 27, 1881, allowed a pension under the provisions of the general law at the rate of \$8 per month from the date of his discharge, March 20, 1865, to September 17, 1879, the date upon which it was shown that he died.

It appearing that the soldier had left neither widow nor child surviving, a claim for reimbursement of the expense of his last sickness and burial, amounting to \$305.20, was allowed and paid on October 19, 1881, to one James W. Putnam, his executor, who was shown to have borne such expense.

On April 4, 1892, one Mary E. Tomney, claiming to be a sister and the legal representative of the deceased soldier, filed in the Pension Bureau an application for the balance of the accrued pension due on the certificate issued to said soldier as aforesaid, claiming to be entitled thereto under the provisions of the act of March 1, 1889.

On May 7, 1902, said Mary E. Tomney was informed by the Pension Bureau that the act of March 1, 1889, under which her claim for said accrued pension was made, had been repealed by the act of March 2, 1895, and that under the provisions of this latter act only so much of

the pension which accrued at the date of the soldier's death could be paid as was required to reimburse the person who bore the expense of his last sickness and burial, and that this allowance had been made and paid to the executor of the soldier, and, therefore, the balance of said accrued pension could not be allowed and paid to her under the existing provisions of the law.

From this action the present appeal was taken on May 13, 1902, in which it is contended that the act of March 1, 1889, had only been superseded and repealed by the act of March 2, 1895, since September 28, 1892, which date was subsequent to the allowance of pension to the deceased soldier, consequently, the provisions of said latter act have no application to this case.

The foregoing contention of the appeal in this case is the only one therein contained which it is necessary to consider.

The act of March 2, 1895, is an act which provides for the payment of accrued pension upon the death of a pensioner, or a person entitled to pension, and has no bearing upon or relation to when such pension may have been allowed. Said act provides that from and after September 28, 1892, accrued pension shall be allowed and paid in certain cases and to certain persons, and it also provides that from and after said date no accrued pension shall be allowed and paid in certain other cases, one of which is where no widow or child survives the pensioner, except so much as may be necessary to reimburse the person who bore the expense of his last sickness and burial. It is manifest, therefore, that the payment of accrued pension at the present time must be governed by the provisions of said statute, irrespective of when the allowance of pension was made. Furthermore, said act expressly and in terms provides "that all prior laws relating to the payment of accrued pension are hereby repealed," and this provision was placed in said act for the express purpose of repealing the provision of the act of March 1, 1889, under which this application for accrued pension is made, and to prevent any future payments of accrued pension under said provision.

It is evident, therefore, that under the existing law regulating the allowance and payment of accrued pension no part of the pension that accrued on the death of the soldier could be paid to this appellant.

But even if the provision of the act of March 1, 1889, under which this claim is made, had not been repealed by the act of March 2, 1895, this appellant would have no title thereunder to the accrued pension of the deceased soldier.

Said provision of the act of March 1, 1889, is as follows:

Provided, That hereafter whenever a pension certificate shall have been issued and the pensioner mentioned therein dies before payment shall have been made, leaving no widow and no surviving minor children, the accrued pension due on said certificate to the date of the death of said pensioner may, in the discretion of the Secretary of the Interior, be paid to the legal representatives of said pensioner.

It is clear from the language of said provision, and it has so been held by this Department and by the Attorney-General of the United States (3 P. D., 430), that it would have no application except in those cases where the pensioner died subsequent to the passage of said act. Since the pensioner in the present case is shown to have died long prior to the passage of said act, it is manifest that this appellant would have no title to the accrued pension due on his certificate even were said provision still in force.

In view of the foregoing the Department is of the opinion that the action from which this appeal was taken was clearly without error, and it is affirmed accordingly.

SERVICE—SECTION 4701 OF THE REVISED STATUTES AND ACT OF JUNE 27, 1890—DISCHARGE—DISBANDMENT.

ADAM KOHLER.

Soldier enlisted April 3, 1865, and was honorably discharged with his company by reason of expiration of service June 25, 1865, but said organization to which he belonged was not disbanded until July 14, 1865.

Held: That under the provisions of section 4701 of the Revised Statutes the period of his pensionable service was extended to July 14, 1865, and the rejection of his invalid claim under the act of June 27, 1890, on the ground that he did not serve ninety days in the United States service was error.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 12, 1902.*

Adam Kohler, late private in Company G, One hundred and third Pennsylvania Infantry, appealed September 11, 1901, from the Bureau action of February 1, 1893, rejecting his invalid claim, No. 999178, filed February 24, 1891, on the ground that he did not serve ninety days in the United States service.

Claimant contends that while he was discharged with his company, they were not paid off or disbanded until July 13, 1865, and that according to section 4701 of the Revised Statutes his service did not terminate until the disbandment of the company.

Section 4701, Revised Statutes, provides that—

The period of service of all persons entitled to the benefits of the pension laws, or on account of whose death any person may become entitled to a pension, shall be construed to extend to the time of disbanding the organization to which such person belonged, or until their actual discharge for other cause than the expiration of the service of such organization.

It appears from the record of the War Department that soldier enlisted April 3, 1865, and was honorably discharged with his company by reason of expiration of service June 25, 1865, but said organization to which he belonged was not disbanded until July 14, 1865.

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Under the provisions of section 4701 of the Revised Statutes the period of his pensionable service was extended to July 14, 1865, the time of the disbanding of the organization to which he belonged, and the rejection of his invalid claim under the act of June 27, 1890, on the ground that he did not serve ninety days in the United States service was error.

The Bureau report in the case of April 25, 1902, stated that—

A report from the War Department in certificate 984173, Jefferson Freeman Thomas, Company One hundred and third Pennsylvania Infantry, states that the regiment was paid and disbanded July 14, 1865, at Harrisburg, Pa.

In certificate 975136, Thomas B. May, same company and regiment, it is stated in a report from the Auditor of the War Department that "it is presumed by this office that the company was disbanded when last paid, July 12, 1865."

A report from War Department in certificate 898058, George W. Hill, states that the regiment was finally paid and disbanded July 14, 1865, and the same statement appears in case certificate 915378, Daniel C. Baker.

None of the reports mentioned furnish any information as to the whereabouts of the soldier or the nature of duties performed, if any, after date of muster out and prior to disbandment of regiment.

A recent report from the War Department in another case states that the records afford no information relative to the presence or absence of the soldier between the date of muster out and the date of disbandment of the organization, and adds:

"It may be stated that as the records of a company are closed on the date of its muster out of service, the records do not usually afford any information as to the personnel of the organization after that date."

Thus, while it may be regarded as settled by numerous departmental decisions that in a general sense the provisions of section 4701 apply to claims under the act of June 27, 1890, it is still a matter of some uncertainty whether it must necessarily be assumed that the soldier was, during the period between his muster out and the disbandment of the organization, rendering such service as is contemplated by act of June 27, 1890, as defined in decision in the case of John R. Trout, Volume XI, page 435. Shall it be presumed that he was rendering such service or shall inquiry be made in each case to determine where the soldier was and what he was doing after he was mustered out?

It is certain that the soldiers were in a degree at least released from military control as soon as mustered out, though still awaiting final payment, and in some cases soldiers went to their homes and remained until the day for payment arrived.

For the reasons indicated it is desired that the Department determine definitely whether in cases such as the one now under consideration the proper course is to seek evidence as to where the soldier was and what doing after muster out.

In response to the foregoing inquiry the Department is clearly of the opinion that in view of the plain and explicit language of said section 4701 it becomes immaterial to inquire whether claimant was present or absent from his organization after the muster out of the same for the purpose of determining the length of his pensionable service under the act of June 27, 1890, or the act of May 9, 1900. Said acts are to be construed in connection with section 4701, in *pari materia*, as if said section had been reenacted and embraced in said acts of 1890 and 1900. (Adolph Bernstine, 7 P. D., 229.)

Section 4701 was not considered or discussed in the case of John R.

Trout (11 P. D., 435), as the question of the disbandment of the organization to which that claimant belonged was not involved, the only question being whether soldier served between the date of his enlistment and muster out.

The statement in the Trout case that—

A man voluntarily absent from his command without leave, or with leave for purposes of his own business or pleasure, was not serving his country during the time of such absence—

while applicable to the facts in that case, would not be applicable to a case of a soldier's constructive or pensionable service after being mustered out by reason of the "expiration of the service" of the organization to which he belonged and prior to the "time of disbandment of the organization to which such person belonged."

There is, therefore, no conflict between the holding of the Department in the present case and the Trout case, above cited.

So, also, there should be no confusion of "line of duty" with "service" in this class of cases under the acts of June 27, 1890, and May 9, 1900. A soldier may be outside the line of duty, as that term is understood in the pension laws, and still be in the service within the meaning of the acts of June 27, 1890, May 9, 1900, and the express terms of section 4701. On the other hand, he may by temporary absence or desertion so place himself outside the line of duty as to disassociate himself from the service for pensionable purposes, as in the case of Obediah P. Hankinson (7 P. D., 227, and 9 P. D., 292); Philip E. Ryan (9 P. D., 289); Basil T. Ridgeway (*Ibid.*, 300).

Claimant in the case under consideration could not have been punished for desertion subsequent to the date of receiving his discharge, although he would, for pensionable purposes, be deemed to be in service up to the date of the disbandment of his organization.

If, however, he had voluntarily absented himself from his command after his discharge, he would not be regarded in line of duty so as to entitle him to a pension under the general law for disease contracted or injury received subsequent to his discharge and prior to the disbandment of his organization, although still in the service under section 4701 of the Revised Statutes. But if, after receiving his discharge, he continued with his command up to the date of their disbandment, he would be pensionable under the general law for disease contracted or injury received in line of duty subsequent to discharge and prior to disbandment of his organization, as was held in the case of William M. Guy (7 P. D., 484), following the decision in the case of George W. Hill (*Ibid.*, 236).

In the case last above cited Hill's service was in the same organization (One hundred and third Pennsylvania Infantry) as claimant's. He enlisted and was discharged on the same date as claimant, and following the decision in his case (7 P. D., 235) May 19, 1894, and upon

a further report of the War Department showing that said organization was disbanded July 14, 1865, he was pensioned by Bureau action of November 6, 1895, under the act of June 27, 1890, as appears from an examination of the papers in that case.

So, also, Jefferson Freeman, of the same regiment, who enlisted March 31, 1865, and was mustered out with his company June 25, 1865, was pensioned by Bureau action of June 14, 1899, under the act of June 27, 1890, certificate No. 984173, although his service from enlistment to muster out was less than ninety days.

Thomas B. May, of same company and regiment, enlisted and was mustered out on same date as Freeman. He was pensioned by Bureau action of December 1, 1898, under said act of June 27, 1890, certificate No. 975136.

Daniel C. Baker, of the same company and regiment, enlisted March 29, 1865, and was mustered out with his company June 25, 1865. His claim under the act of June 27, 1890, was rejected by Bureau action of October 17, 1892, on the ground that he served less than ninety days. From that action the claimant appealed, and the Department, after referring to section 4701 of the Revised Statutes and citing the departmental decision in the case of George W. Hill (*supra*), reversed the Bureau action, and claimant was pensioned under the act of June 27, 1890, by Bureau action September 3, 1896.

In the case under consideration the facts as to enlistment, discharge, and disbandment being substantially the same as in the former cases above referred to, and the law applicable to his case having remained unchanged, the Bureau action in his case so far as it related to the term of his service should have been the same.

So far as claimant's title to pension under the act of June 27, 1890, depended upon length of service, it does not depend upon the question whether he was present or absent from his organization after he received his discharge. It appears that the regiment was mustered out of service at Newbern, N. C., June 25, 1865, and was disbanded at Harrisburg, Pa., July 14, 1865. If, instead of accompanying his regiment to Harrisburg, he had remained at Newbern after receiving his discharge, his term of service, for pensionable purposes, would have been in no manner affected. It therefore becomes immaterial in cases under the act of June 27, 1890, or the act of May 9, 1900, to inquire into or require proof of claimant's whereabouts after discharge and prior to the disbandment of the organizations where they were discharged by reason of the expiration of their service. Their services in such cases are presumed to be in the war of the rebellion within the meaning of said acts, where their enlistments were in or for the war of the rebellion.

As claimant served more than ninety days in the war of the rebellion, the action appealed from is reversed.

PRACTICE—APPEAL—RULE 2 OF RULES OF PRACTICE—DIVISION OF PENSION, ACT OF MARCH 3, 1899.

MINERVA C. SCOTT v. SAMUEL SCOTT.

1. The appeal in this case assigns no specific error on the part of the Bureau in the allowance of the claim for division of pension, as required by rule 2 of Practice, but as an examination of the evidence fails to disclose any error in the Bureau action appealed from, the same is affirmed.
2. Good practice, as well as a proper regard for the rights of the appellees, in cases under the act of March 3, 1899, requires a strict compliance with said rule 2 on the part of appellants, and in future a failure on the part of the appellants to comply with said rule will be deemed sufficient reason for dismissing their appeals.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 12, 1902.*

Samuel Scott, late a private in Company E, Eighty-ninth Ohio Volunteer Infantry, and a pensioner at \$17 per month under certificate No. 488652, appealed May 13, 1902, from the Bureau action of May 10, 1900, allowing the claim of Minerva C. Scott, filed September 14, 1899, for division of pension under the first proviso of the act of March 3, 1899.

Pensioner's appeal is as follows:

In reference to my claim, certificate No. 488652, would ask an appeal from the action of the Commissioner of Pensions wherein Minerva C. Scott, my wife, was allowed one-half of my pension on the 10th day of May, 1900, basing desertion as grounds for her action.

This appeal assigns no error on the part of the Bureau, nor does it indicate the ground on which pensioner bases his appeal, and fails to conform to rule 2 of Practice, which provides that—

The appeal must be filed with the Secretary, and should point out specifically the mistake or error of fact or of law in the decision, judgment, or order complained of.

Good practice as well as justice and fairness to the appellee requires a strict compliance with the requirements of said rule in cases under the act of March 3, 1899.

Rule 14 of Practice requires appeals in this class of cases to be served upon the appellees, that they may be advised of the reason or reasons for which the Bureau action is sought to be reversed or modified, in order that they may answer the contention of appellants.

The service of such an appeal as is filed in this case upon the appellee would convey no information to her as to the grounds on which he based his appeal.

Under rule 15 of Rules of Practice, appeals in this class of cases operate as a supersedeas, and suspend payment of the one-half of the pension in controversy; and it is therefore important that the appeal should not be vague or indefinite, but should conform to the rule of

practice and advise the opposite party of the grounds on which relief is sought.

In the present case no reason appears for reversing said Bureau action for any cause.

It appears from an examination of the papers in the case that pensioner's contention before the Bureau was that claimant deserted him; that they were living in Illinois, in 1895, when, by an amicable arrangement, it was agreed that he was to return to Adams County, Ohio, and that she was to join him there with the children later; that instead of so doing she removed to Nebraska and has refused to return to him as promised in 1895; that he was ready and willing to furnish transportation for her to come to him in Ohio at all times, but had not heard from her for years.

Claimant contended that pensioner abandoned her and his family of seven children, one of whom was a helpless cripple, in Nebraska, in 1894, and that she subsequently followed him to Bradford, Ill., having discovered his whereabouts through the pension agency at Des Moines, Iowa; that soon after, and about April 1, 1895, his sister furnished him money to go to Ohio, since which time she has received no contribution or support from him, although the agreement was, when he last left her, that he would send her money to come to Ohio; that instead of so doing he committed adultery with one Del Moore, by whom he has had two illegitimate children, and that he was convicted of adultery in Adams County, Ohio, October, 1898.

Claimant has filed with her answer to pensioner's appeal a letter, which appears to have been written by him to his son, January 5, 1899, in which he admits that he was convicted of adultery.

The prosecuting attorney of Adams County, Ohio, has also certified to said conviction of pensioner.

In view of this fact claimant's refusal to come to him in Ohio, even if he had offered her a home, would be legally justified, and her alleged desertion of him in 1895 would become immaterial, and the action appealed from in this case is affirmed.

In future, appeals in cases of this class under the act of March 3, 1899, will be required to conform to rule 2, Rules of Practice, and a nonobservance of said rule by appellants will be cause for dismissal of their appeals.

DIVISION OF PENSION, ACT OF MARCH 3, 1899—DESSERTION—DOMICILE.

IONA A. PIERCE *v.* CHESTER PIERCE.

1. The refusal of the wife to follow her husband, who had deserted her, to another State and leave her home upon the mere offer of her husband to provide a home for her does not necessarily constitute her the deserter. *Schouler's Domestic Relations* (3d ed., par. 38); *Gleason v. Gleason* (4 Wis., 64); *Bishop v. Bishop* (30 Pa. St., 412); *Hardenberger v. Hardenberger* (14 Cal., 654); *Powell v. Powell* (29 Vt., 148); *Phelan v. Phelan* (35 Ill. App., 511, and 135 Ill., 445).

2. The desertion of the husband entitled the wife to her own domicile. *Moffatt v. Moffatt* (5 Cal., 281).

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 12, 1902.*

Chester Pierce, late private, Company B, Ninth Indiana Infantry, and pensioner at \$24 per month under certificate No. 11519, appealed May 19, 1902, from the Bureau action of November 25, 1901, allowing his wife's claim for division of his pension, filed February 7, 1901, under the act of March 3, 1899, and holding that pensioner deserted claimant, his lawful wife, who was a person of good moral character and in necessitous circumstances.

Pensioner contends, in brief, that his wife is responsible for their separation and that she has refused to live with him, although he has offered her a home and refers to her letter of June 20, 1900, in which she acknowledges that she ordered him to leave her home.

There is no letter from claimant of that date on file, and pensioner doubtless intended to refer to her letter of January 11, 1900, which will be hereafter referred to.

Claimant in her answer to said appeal, filed May 26, 1902, contends that the Bureau action appealed from was fully justified by the evidence, that pensioner is not a reliable witness, and that if he has any letter of hers in which she acknowledged that she ordered him to leave home, it is a forgery.

Claimant and pensioner were married at Coloma, Mich., December 20, 1886, and separated about June 6, 1887, since which time they have not lived together, and the evidence shows that pensioner has not since contributed to her support.

Since said separation claimant has continued to live at Coloma, Berrien County, Mich., and pensioner first resided for a short time at Bangor, Mich., and in the spring of 1888 he went to Chicago, and in the fall of 1888 went to Kansas. The next summer he spent in Colorado and Nebraska, and in the fall went to California, and is now residing in Los Angeles, in that State.

Pensioner testifies that during his absence from claimant he has frequently sent her money, and that he has solicited her to join him in California and that she has refused; that he was compelled to leave her because of his alleged religious views, and that he is the victim of religious persecution at the hands of claimant's relatives and friends; that she ordered him out of her house, carried his valises to the street, and told him never to come back; that she has a home and is not in necessitous circumstances.

Claimant denies that she ordered or requested her said husband to leave her or that he had any just grounds for leaving her; denies that he has sent her money, except \$5 received October 25, 1899, or in any

manner contributed to her support since he left her in June, 1887; denies that she has refused to live with him, or that he has ever offered her a home until after her application for one-half of his pension, and alleges that his offer of a home was not made in good faith; that the \$5 she received from him in 1899 she credited him on account for money he had borrowed of her.

Pensioner admits that he was remarried at San Diego, Cal., 1896; that he had received a letter from his stepdaughter, Nellie Beyea, stating that her mother, the claimant, was dead.

Nellie Beyea testified November 28, 1899, that she had never written such a letter; that she had never written pensioner any letter, and had never corresponded with him.

Pensioner in a letter to claimant October 16, 1899, stated that—

The letter I received in January, 1892, telling me you were dead was in a woman's handwriting, but I fear it would be too much for you at this time to tell you the name that was signed to it, but I think now that the letter and the name was both forged.

Claimant agrees with pensioner that the alleged letter was a forgery, and expresses the opinion that pensioner was the forger. In support of this contention she filed a letter received by the postmaster at Coloma, of which the following is a copy:

SAN DIEGO, CAL., *October 13, 1899.*

MR. POSTMASTER.

DEAR SIR: Will you please inform me by return mail if there is a lady living in Coloma by the name of Ionia A. Pierce, and has she lived there all of the time since 1891, and can you send me the name and address of her husband, and oblige,

Yours,

P. C. GOODALE.

Claimant states that pensioner's name is Chester Goodial Pierce, and that he has in said letter transposed his name; that she had said letter answered, when she received in reply his letter of October 16, 1899, inclosing her \$5, and that this was the first money she had received from him since their separation and the only contribution she has received from him.

Pensioner on November 8, 1899, filed a copy of his letter of October 16, 1899, and claimant's reply thereto, as evidence of his contribution to her support, and alleged, November 1, 1899, in a communication to the Bureau, that he had repeatedly sent her money, as much as he could, and that claimant's statement that the \$5 was the first that she had received was untrue.

In view of the fact that pensioner in his letter of October 16, 1899, stated that the last letter he had received from her was in the fall of 1891, and that he has supposed her dead since 1892, it is unreasonable to believe that he contributed to her support subsequent to 1892 and prior to October 16, 1899. He admits that his full name is Chester G. Pierce, and he so signs his name in the letters to his wife. The

letter to the postmaster at Coloma, October 13, 1899, signed "P. C. Goodaile," appears to be in the handwriting of pensioner.

Dr. Baker further testified in an affidavit November 12, 1901, as follows:

Said Chester G. Pierce was a religious fanatic and placarded his house and fence where he lived with scriptural texts, at the same time running accounts at the store which he never paid. He got the reputation here of being a liar and a hypocrite, too lazy to assist his wife in making a living. He had so many enemies here that it got uncomfortable for him and he left, making the excuse that he did not want to use his pension in support of his wife's children, the offspring of a former marriage. I met Pierce at Bangor, Mich., a few days after he left his wife, and that was the explanation he was making.

Mrs. Pierce, the claimant, has lived in Coloma a great many years and has always borne a splendid reputation, honest, upright, virtuous, and truthful; has hosts of friends who sympathize with her in her hard-working effort to make a living. Pierce left her after she had given birth to a deformed child which luckily died. He left before she had fully recovered from confinement.

Other witnesses testify to pensioner's unjustifiable abandonment of claimant, and her good character and necessitous circumstances.

Almon J. Baker, the supervisor, testified November 15, 1901, that claimant's property was assessed at \$200, under a law which required the property to be assessed at the full cash value, and that this was the only property she owned.

Claimant, however, estimated the value of her said property at \$400 in 1899, at which time she also had \$200 left her by her mother, on which she received the interest of \$10 per annum; that aside from the above she had no other property.

Pensioner at date of his last medical examination, in 1892, was 50 years of age; height, 5 feet 9½ inches; weight, 180 pounds.

His general condition was reported fair and he was shown not to be wholly incapacitated for manual labor. He receives an annual income of \$288 from his pension on account of gunshot wound of face.

In view of the foregoing facts the Department is of the opinion that the evidence shows that soldier deserted claimant in 1887, and has ever since failed to contribute to her support, and that she is in necessitous circumstances within the meaning of the act of March 3, 1899.

The only remaining question to be considered is claimant's alleged refusal to accept pensioner's offer to live with him in California.

The evidence on this point is the alleged correspondence of the parties and claimant's testimony.

Pensioner's offer to resume the suspended relation appears in his letter to claimant written from San Diego, Cal., January 2, 1900, in which, after claiming that a divorce was the best thing for him under the circumstances, he stated as follows:

In the last two or three letters I have tried to find out whether you intended to live with me or not, but you have evaded the answer, but I don't know what purpose you

have in doing so. Now, I have the perfect right by law to demand an answer to my question, Will you come with me where I am and live with me? I want an answer, yes or no. Your silence will mean no.

To this letter claimant replied January 11, 1900, and after referring to the circumstances under which he left her and her failure to hear from him for eight years, and his continued absence, closed her letter as follows:

I could not leave my girls here and come out there. I think it would be best to live in Coloma.

On January 23, 1900, she further wrote him as follows:

I am ready and willing to live with you at any time if you will come here, for I can not come there, as I have my girls to take care of and my property too. I think if we try we can live together all right. Write soon and let me know.

Your true wife,

IONA A. PIERCE.

Pensioner has failed to file a copy of his reply to this last letter, and so far as shown by him the correspondence ended with claimant's letter.

Claimant testifies that she has never refused to live with her husband, and has always been ready and willing to resume her marital relations with him if he would return to her.

While the law recognizes the right of the husband to fix the domicile, and requires the wife to follow the husband under penalty of being considered the deserter, yet he can not exercise this power arbitrarily, but with reason and discretion. He is, therefore, required to show reasonable cause why his wife should follow him when he changes his abode.

Pensioner's contention that his wife is responsible for their separation and that she has refused to live with him, without legal justification, is not sustained by the evidence in the case.

The refusal of the wife to follow her husband, who has deserted her, to another State, and leave her home upon the mere offer of her husband to provide a home for her, does not necessarily constitute her the deserter. *Schouler's Domestic Relations* (3d Ed., par. 38); *Gleason v. Gleason* (4 Wis., 64); *Bishop v. Bishop* (30 Pa. St., 412); *Hardenberger v. Hardenberger* (14 Cal., 654); *Powell v. Powell* (29 Vt., 148); *Phelan v. Phelan* (35 Ill. App., 511; affirmed in 135 Ill., 445).

The desertion of the husband entitles the wife to her own domicile, *Moffatt v. Moffatt* (5 Cal., 281).

The evidence in this case shows that the only legal domicile, the true fixed and permanent home of pensioner and claimant was at Coloma, Mich.

From this home he deserted and has since lived in five different States. He was illegally married in San Diego, Cal., in 1896, according to his own admission; his attempt to establish a home there was evidently a failure, as he admits that he has secured a decree of nullity

from the woman to whom he was then married, and he is now living at Los Angeles, Cal. It does not appear that he has any house or home there to offer to his wife in exchange for the one he asks her to surrender, nor does it appear that his invitation was made in good faith, or with the desire or expectation that it would be accepted.

In the case of *Hardenberger* (14 Cal., 654), heretofore cited, the husband sought to obtain a divorce from his wife because she declined to leave their home in New Jersey and join him in California upon his request; and the court said:

We think the circumstances were sufficient to authorize the defendant (the wife) to regard any proposition for her removal as a proposal addressed merely to her discretion, and which she could reject without incurring the penalty or even suspicion of desertion—

and the husband's application for divorce, based on said alleged desertion, was denied.

In that case the original separation had been amicable; the husband was not in fault.

In the case under consideration the husband is the party in fault; he is the deserter. His legal duty is to rejoin his wife, and having deserted her he can not now by offering her a home (which he does not appear to possess) constitute her the deserter because of her refusal to follow him.

As stated by Schouler on Domestic Relations (3d ed., par. 38):

A husband would not be permitted to remove his wife to some remote and undesirable place for the purpose of punishing or tormenting her, or so as to compel her to stay alone where he did not mean to reside himself; for this would not be fixing the matrimonial domicile with honest intent. Nay, more, there are several recent decisions in this country which point to an obligation on the husband's part to show reasonable cause why his wife should follow him when he changes his abode.

Without further discussion of this case it is sufficient to say that no reason appears for reversing the action appealed from, and it is accordingly affirmed.

MARRIAGE—IMPEDIMENT—EVIDENCE.

REBECCA J. FISHER (WIDOW).

The only evidence of a prior marriage of claimant or soldier is the statement of the former coupled with the statement that the first husband and wife died years before the second marriage, but that it was impossible for her at that late date to furnish further evidence as to that fact.

Held, That claimant having proved the fact of her marriage to the soldier according to the laws of Texas, where said marriage was celebrated and where the parties resided at the time the right to pension accrued, and having cohabited with soldier as his wife from the date of said marriage to the date of his death, ten years thereafter, her pensionable status was established, as the mere presumption of life of a prior husband or wife can not prevail against the presumption of the innocence of the parties who enter the marriage relation according to legal forms. (*Esther A. Palmer*, 11 P. D., 320.)

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 12, 1902.*

Rebecca J., as widow of Michael Fisher, formerly second lieutenant Company B, Third Illinois Volunteer Cavalry, filed a claim for pension under the act of June 27, 1890, April 21, 1892, which was rejected April 1, 1902, in the following stated language:

Approved for rejection on the ground of claimant's avowed inability to furnish the evidence necessary to complete the claim.

From this action the claimant, by her attorney, filed an appeal to the Department May 27, 1902, alleging that the Bureau was in error in its consideration of the evidence in the case and the law applicable thereto.

The Department is in doubt as to the real cause of rejection of this claim. The language of the rejection is vague, uncertain, and indefinite, and if the above cause was the one given the claimant or her attorney it is small wonder that confusion has resulted. The cause of rejection should set out what evidence was necessary to complete the claim. This not having been done the purposes of this appeal can only be met by a careful review of the evidence in order to ascertain if all the essentials to title to pension have been supplied.

The essentials to a widow's title under the act of June 27, 1890, as set out in the Rules of Practice (p. 107), are as follows:

- (1) That the soldier or sailor served at least ninety days during said war.
- (2) That he was honorably discharged.
- (3) Proof of death of soldier, but it need not have been the result of his army service.
- (4) That the widow was without other means of support than her daily labor.
- (5) That she married the soldier prior to June 27, 1890, the date of the act.

This last provision implies, of course, that said marriage was a valid one.

Another essential is that the claiming widow must not have remarried. In the case of minor children under the age of 16 years, the date of birth must be shown.

These essentials will be taken up one at a time in order to ascertain if each one is satisfied by the evidence.

The records from the War Department show that Michael Fisher was enrolled August 13, 1861, and discharged December 26, 1861, upon tender of resignation, thus showing a service of four months and thirteen days, a period of more than ninety days.

The record shows he was honorably discharged.

The death of the soldier is established by the affidavit of the keeper

of the public records of Harrison County, Tex., which records the affiant states show he died July 11, 1883. The statement of the claimant and three witnesses is in corroboration of the affidavit of the keeper of the records.

As to dependence, the record has the statement of the claimant and five affiants who assert that she has no revenue from any source and owns no property and pays no taxes. The unsworn statement of the tax collector of the county where claimant lives is on file, and is as follows:

I am tax collector of this, Harrison County, Tex., and hereby certify that the tax rolls of my office do not show that Mrs. Rebecca J. Fisher has at any time paid any taxes on any property, nor do my rolls show any assessments on any property owned by her since the year 1891.

The marriage of the claimant to the soldier is established by duly certified copies of the records, showing the issuance of the license, and the performance of the ceremony on January 30, 1873.

Up to this point the evidence seems ample to establish each of the essentials to title. The question of the validity of said marriage is an issue which needs investigation.

In her declaration the claimant stated that before her marriage to the soldier she was married to one Samuel J. Bryant, "who died in 1866, on the 1st day of May."

In her claim filed under the general law the claimant stated that both she and her husband, Fisher, had been previously married, but she did not remember the dates of the deaths of former spouses.

It appears that the claimant signed both declarations by mark, showing that she did not write either of them.

On April 18, 1898, in answer to a call from the Bureau the following affidavit of claimant was filed:

I am the widow of Michael Fisher—he is now dead. He served as a soldier in the United States Army during the civil war. He never applied for a pension, though I have often heard him say that he was entitled to one. He was a very conscientious man, and said that he would never apply for one as long as he could make a living without doing so. He talked to me some about this before he died, but I can now remember all he said about it. He told me that he was entitled to bounty pay, and that he had paid his own way back home from the Army—I mean from Rolla, Mo., to Pekin, Ill.—but my husband left no papers of any kind by which I can prove these last facts. I was married to Michael Fisher January 30, 1873. In a former affidavit I stated that we were married January 29 of that year, but I was mistaken as to the exact day, and now learn that I was married to him January 30 of that year. Have consulted the records about it, and the record is correct in the matter. I was a widow Bryant when I married Fisher, my former husband (Bryant) having died. He died some time in 1864 in another part of the State, and I have no family record of his death. I have made much effort to prove the death of my first husband and also the death of Michael Fisher's first wife by writing and inquiry of all sorts, but they have both been dead so many years that it is now impossible for me to prove their deaths. I have no living friends that I know of that know these facts.

Michael Fisher never served in any military or naval service of the United States prior to August 13, 1861, or after December 26, 1861. He was a second lieutenant in the service and had a commission. I was never married except to the parties mentioned, and was never divorced, and have never remarried since the death of my last husband, Michael Fisher.

Hiram Fisher is the only son or child of my marriage with Fisher, who was under 16 years of age at Fisher's death, and he is now living. Hiram Fisher was born December 23, 1879. I have no property, either personal or real, and have no income of any kind or source, except what I can earn by my own manual labor, and have no revenue of any kind other than my labor. I am now old and in very feeble health and no longer able to work, and have to live as best I can on the kindness and charities of others. I have no property and have not had any since I first applied for a pension. I am in very needy circumstances and not strong enough to work.

On the same date as the above affidavit was filed another one signed by Wesley Hinton:

I know Mrs. Rebecca J. Fisher. She is the widow of Michael Fisher; have known them for twenty or more years; lived near them, and part of the time lived on the same plantation with them; was often with them; have had good opportunity of knowing their family affairs. My wife and I were good friends of the family and often visited. I was living in half a mile of the Fisher family when their son Hiram was born. I was at their house on the day of his birth. Hiram Fisher was born December 23, A. D. 1879.

Michael Fisher is now dead. I saw him in his last illness, and used to talk with him about his business and family matters; often heard him say he had served as a soldier, and was entitled to draw a pension. He told me he had never applied for a pension, and did not expect to apply for any as long as he could make a living without one. He also told me that the Government owed him bounty, and that when he went home from the army he had to pay his way home. I heard him say that his first wife had died during the war; that she died sometime in the year 1863. I know Mrs. Rebecca Fisher well; when she married Fisher she was a widow Bryant. Bryant, her first husband, died sometime in 1864; don't remember the month. She was never divorced from either husband. Since Michael Fisher died she was never remarried. She has no income other than her manual labor, and no property of any kind.

The marriage in this case is shown to have been performed in the State of Texas in accordance to legal forms, and the evidence shows that the parties lived together in said State as husband and wife for ten years, the soldier dying July 11, 1883. The claimant states she was married and so was her husband before the marriage in issue, but that both spouses were dead when said marriage was entered into. There is not a scintilla of evidence to the contrary and, in fact, there is evidence in corroboration of the fact that both were dead and the parties at liberty to enter into a new contract. There is a strong presumption in favor of the marriage shown in this case.

In the case of Esther A. Palmer (11 P. D., 320), the Department held:

The claimant having proved the fact of her marriage to the soldier according to the law of the State of Illinois, and cohabited with him as his wife from marriage to date of his death, sixteen years afterwards, her pensionable status was established.

A mere presumption of life of a prior husband can not prevail against the presumption of the innocence of parties who enter the marriage relation according to legal forms.

See also cases of *America Hooker* (8 P. D., 210); *Minerva Brown* (11 P. D., 266); *Annic B. Burgoyne* (12 P. D., 182).

In the case under consideration the only evidence of a prior marriage of the claimant, or the soldier, is the statement of the former and one witness, and both statements are coupled with the statement that the prior marriages had been dissolved by death. There is just the same evidence in this case that the former husband of the claimant and the former wife of the soldier were dead long prior to the marriage in issue as that they were ever previously married. As a matter of law, the marriage of the claimant and the soldier has not been attacked in any manner sufficient to destroy its validity. From the proof of the celebration of the marriage there arose such a strong presumption that it was valid, that said presumption is not overcome by the mere fact that each of the parties to it had been married before. This principle, however, need not be invoked in this case for the reason that what evidence there is shows that the parties were free to contract the marriage in issue.

The evidence shows that the claimant has not remarried since the death of the soldier.

It is also shown that there is but one child who was under sixteen years of age at the date of the death of the soldier, he being born December 23, 1879.

The record has been carefully examined and there is no essential to the title of this widow to pension under the act of June 27, 1890, which has not been established by sufficient evidence.

This being true, nothing remains but to reverse the action of the bureau from which appeal was filed, with instructions to give claimant a pension under said act from date of filing claim

DIVISION OF PENSION, ACT MARCH 3, 1899—DESERTION.

ALICE SMITH v. THOMAS SMITH.

The fact that claimant, since the allowance of her claim for division of her husband's pension, refused to live with him will not justify a reversal of the Bureau action.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 18, 1902.

Thomas Smith, late a seaman U. S. S. *North Carolina*, United States Navy, and pensioner under certificate No. 21346, appealed June 4, 1902, from the Bureau action of May 24, 1902, allowing the claim of Alice Smith, filed January 24, 1902, for division of his pension under the

act of March 3, 1902, on the ground that pensioner had deserted claimant, his lawful wife, who is a person of good moral character and in necessitous circumstances.

Pensioner contends that he called on claimant June 2, 1902, and asked her if she was willing to come and live with him, and she replied, "No," and threatened him with arrest if he did not go away, and slammed the door in his face.

Even assuming that pensioner's offer to resume marital relations was made in good faith, a fact not proved, claimant's refusal to live with pensioner since the allowance of her claim, would not alone justify a reversal of the Bureau action appealed from, for the reasons, first, that her refusal may have been legally justified; and, second, her refusal to resume marital relations with pensioner if not legally justified would not change the status of the case at the date of the adjudication.

Where the course or conduct of the wife, subsequent to the allowance of her claim by the Bureau, is relied upon to show that the Bureau action should be changed or modified, the application for relief should be first made to the Bureau.

No valid reason appearing for reversing or modifying the action appealed from, the same is accordingly affirmed.

PATHOLOGICAL SEQUENCE—CANCER AND MALARIAL POISONING.

JOHN C. HOLTORF.

The claimant is pensioned, on account of malarial poisoning and resulting disease of liver, at the rate of \$12 per month. The official examination under the claim revealed no material increase of disability from said cause. An induration or tumor at the pyloric end of the stomach was described in the report of said examination, and it appears from the statements of the claimant and the attorney that this condition has been diagnosticated as cancer. There is no apparent or probable pathological relation between this disease and the pensioned disability.

Pensions are granted under certain conditions for wounds or injuries received or diseases contracted in the service of the United States and in the line of duty, and for the pathological results or sequelæ of such wounds, injuries, and diseases. Such pathological results or sequelæ must be recognized and accepted by standard medical and surgical authorities in order to be admitted as to the basis for additional allowance of pension. There is no warrant, either in the law or in the established practice, for admitting any disability as such result or sequence unless it is so recognized and accepted.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 18, 1902.*

John C. Holtorf, late a private in Company C, Twenty-ninth Indiana Volunteer Infantry, is a pensioner at the rate of \$12 per month,

under the general law, on account of malarial poisoning and resulting disease of liver; certificate No. 254379.

A claim for increase of pension was filed October 7, 1901, and the claimant alleged "great increase in the severity of the disease." This claim was rejected by the medical action of April 15, 1902, on the ground that there was no increase of disability from the pensioned cause.

The recognized attorney, on May 5, 1902, filed an appeal to the Department, asserting that the soldier has a cancer of the stomach; that "the cause for cancer has never yet been determined," and that it is recognized that "cancer often arises from sources of irritation." It is contended, further—

that malaria of a chronic form is a distinct source of irritation; that, no matter how little we know about cancer, all pathologists agree that irritation is a most pronounced factor; that the secondary anæmia, due to long-continued malaria, is a well-recognized causative factor in the formation of cancer.

No medical or other testimony was filed in support of the claim nor in connection with the appeal, but the claimant has recently filed a lengthy statement giving a history of his physical troubles.

The medical examination under the claim in contention was made February 26, 1902. The report shows as follows:

Age, 65 years; height, 5 feet 8 inches; weight, 136 pounds. * * * General appearance, stooped, sallow, pale, anæmic, emaciated. Skin wrinkled, dry, with numerous pin-head ecchymoses on chest and back.

Teeth all gone above and below, except central incisors below. Some pyorrhœa. Tongue pale, smooth, furred at root, tremulous, pale. Throat pale.

Stomach walls thickened, indurated at pyloric end, and very tender; area, 3 by 7 inches.

Liver in post-axillary line from ninth to last rib; in mammary line from tenth to costal arch; in median line $1\frac{1}{2}$ inches wide and extending to the left up to the cardiac dullness. Left lobe larger in proportion than the right. Surface smooth and tender.

Spleen, ninth to twelfth rib; can be felt distinctly. Abdomen tympanitic all over.

Rectum, three external hemorrhoids, three-eighths inch in diameter, very livid; mucosa livid for 2 inches; mucopurulent bloody discharge. Prostate, $1\frac{1}{2}$ by 1 inch; not tender. * * *

Organic disease of the heart, chronic bronchitis, right inguinal hernia, and weakness or partial paralysis of the right hand were also described.

The board did not state their opinion as to the nature of the induration or tumor at the pyloric end of the stomach, and there is no evidence except the assertions of the attorney and the claimant that it is cancerous. The claimant's general condition as described in this report is very similar to that described in the last preceding report, made in 1890, and his weight was then 135 pounds. It is apparent that there has been no material increase of disability from the pensioned causes, and that the claimant had not lost in weight as persons generally do who are afflicted with malignant disease.

The diagnosis of cancer of the stomach, which appears to have been made in the summer of 1901, may or may not be correct, but the Department will accept it as though it were established, as contended.

It is true that the cause of cancer has not been determined. It is also true that chronic irritation of a local character would seem to be a factor in the causation of this disease in some cases, such as cancer of the lip or of the tongue. There is, however, no competent medical authority for assuming that chronic malaria is a distinct source of such irritation, or that the secondary anæmia of malaria is recognized as a causative factor, as alleged. Should there be any such relation the same would readily be demonstrated in the adjudication of pension claims; but it may safely be stated that the occurrence of cancer of the stomach is as rare in the cases of veterans who are pensioned for malarial poisoning as in those who are pensioned for other affections.

With reference to the etiology of cancer Stengel states:

* * * No proof of the existence of any definite dyscrasia has ever been furnished, though it is apparent on study that some form of disposition to this growth acts as the predisposing cause, even if traumatism, infection, or other factors are the immediate cause. (Pathology, 3d ed., 1900.)

If this "form of disposition" were as common as malarial poisoning it would almost certainly have been recognized long ago by the investigators, but the above quotation appears to represent the views of the leading pathologists of to-day. It is well known, however, that malignant cancer of the stomach is essentially one of advanced years, and that its course tends rapidly to a fatal termination. There is, therefore, no reasonable probability that any relation existed between the pensioned disability and the development of this affection.

Pensions are granted under certain conditions for wounds or injuries received or diseases contracted in the service of the United States and in the line of duty, and for the pathological results or sequelæ of such wounds, injuries, and diseases. Such pathological results or sequelæ should be recognized and accepted by standard medical and surgical authorities in order to be admitted as to the basis for additional allowance of pension. There is no warrant, either in the law or in the established practice, for admitting any disability as such result or sequence unless it is so recognized and accepted.

As already shown, there is no reasonable probability that the supposed cancer of the stomach was due to the pensioned disability, and there was no material increase of disability therefrom. The Department accordingly affirms the action rejecting the claim for increase of pension.

PATHOLOGICAL SEQUENCE—DEATH CAUSE—PRACTICE—WITNESSES—EVIDENCE.

ANN E. JOHNSON (WIDOW).

1. The soldier was pensioned for lumbago, and no other affection was alleged or shown to be due to his military service. His death, in 1899, was ascribed by the attending physician to suppression of urine. The evidence shows that the primary cause of the urinary trouble was enlargement of the prostate gland. The pensioned disability was not a material factor in the fatal issue, either directly or indirectly. Lumbago, or rheumatism, is not recognized as a cause of enlargement of the prostate gland.
2. The official statements of examining surgeons are only such statements as are made in their official reports or directly in connection therewith. When an examining surgeon happens also to be (or to have been) the attending physician of a soldier, and in his capacity as such physician furnishes testimony in support of any claim for pension based upon the service of such soldier, his testimony is not official.
3. Additional evidence in pension claims is that which is both executed and filed in addition to evidence which was previously executed and filed; it is also such evidence as may have been executed prior to the adjudication of a claim if the subsequent filing thereof is satisfactorily accounted for. When testimony has been intentionally withheld after its execution and not filed until the claim has been adjudicated, it can not be regarded as additional.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 18, 1902.*

Ann E. Johnson is now a pensioner under the act of June 27, 1890, as the widow of Walter Johnson, late a corporal in Company G, Fourth West Virginia Volunteer Infantry; certificate No. 525142. Her claim under the general law was previously rejected on the ground that the soldier's death was not due to his military service, and the rejection was subsequently adhered to.

An appeal to the Department from the action of rejection was filed January 28, 1901, through the recognized attorney. It is contended that suppression of urine was the cause of the soldier's death and that this affection was a result of lumbago or disease of hips and back, on account of which he was a pensioner.

The records of the War Department show that the soldier enlisted July 18, 1861, and that he was honorably mustered out with non veterans August 24, 1864. No medical record has been found.

The soldier stated in his original claim, in 1881, that he had refused to be treated in hospital, but was treated in camp on various occasions. He then alleged that on or about December 20, 1862, he had been taken down with a severe pain in the hips and small of the back, from which he suffered more or less continually up to that time. This claim was legally approved, in 1884, for disease of hips and back (lumbago) and he was pensioned for this disability up to the time of his death.

A claim for additional pension on account of disease of eyes was filed in 1892. The soldier alleged therein that this affection was contracted on or about May 1, 1862, and that he had been treated in hospital at Charleston, W. Va. This claim was rejected in 1894, on the ground that no disability existed from the date of filing thereof.

The soldier died May 12, 1899, after an illness lasting about four days.

In a statement dated June 12, 1900, and filed in the Pension Bureau June 16, 1900, Dr. H. P. Gerlach certified that he was called to see the soldier on May 9, 1899, and found him suffering from severe pain in the lumbar region and suppression or retention of urine, with great difficulty in passing the same; that the heart's action was violent (but there was no apparent evidence of organic disease), and that there were "rheumatic pains all over him." However, in a former statement, which was written soon after the soldier's death and filed along with the widow's claim, the doctor merely said that he "found him suffering from rheumatism of the back, resulting in complete suppression of urine, from which he died." Continuing, in the later statement (filed in June, 1900) the doctor asserts that, on his second visit, the symptoms were increased in severity, particularly the pain in the back, and there was complete retention of urine, necessitating the use of an aspirator for emptying the bladder; that he was unable to introduce a catheter owing to enlargement of the prostate gland and very great sensitiveness at the neck of the bladder; that, some twenty-four to thirty hours previous to death, there was complete suppression of urine, as the aspirator was then used without success. He gave it as his opinion that the remote cause of death was rheumatism and that the immediate cause of death was suppression of urine brought on by chronic rheumatism, without other complications.

Such was the medical testimony on file at the time the claim was rejected, October 11, 1900. Upon receiving notice of said action the attorney filed in the Pension Bureau a request for reopening and reconsideration of the claim. Along with this request the attorney filed what he termed an "additional" and "official" statement of Dr. Gerlach, asserting that it shows the soldier's death cause was complicated with his disease, or rheumatism of the back and hips.

Although this statement was not filed in the Pension Bureau until October 16, 1900, it bears the date of August 8, 1899, and it appears to have been prepared at that time in response to the call for evidence which was made in July, 1899. Dr. Gerlach then gave an account of the fatal illness, which was in some respects fuller than that contained in his later statement, which is summarized above. He stated that the soldier took sick on May 8 with pain in the back in the region of the kidneys and with difficulty in urinating. This difficulty increased until, on the 9th, it became impossible for him to pass any urine at all, and

about three pints of very dark-colored urine were removed when the trocar was introduced into the bladder through the pubic region. On the 10th the pulse became rapid and slightly feeble, the patient was thirsty, but there was no rise of temperature; he was unable to pass more than a few drops of urine at one time, and pain through the region of the bladder, back, and hips was increasing. The trocar was introduced again on the night of the 10th, but no urine was obtained. The symptoms increased, and the abdomen became distended with gas. The doctor did not see the patient after the morning of the 11th, and considered the case entirely hopeless at that time. His last examination of the urine, on the 10th, revealed no abnormality of importance. He further stated that he had treated the soldier a number of times during the last twelve or thirteen years, always complaining of pain in the back and trouble in passing urine; that he thought the soldier was suffering from rheumatic trouble in the back, and to some extent all over him, and that this "affected his urinary organs, resulting in suppression of urine, likely some uremic poison, and death."

The doctor made no mention of the enlargement of the prostate gland in this earlier statement, and he ascribed the whole trouble to rheumatism. But it would appear that this statement was considered unsatisfactory by the attorney, for it was withheld and barely filed as a last resort.

None of the statements of Dr. Gerlach has been sworn to. He is (or was) a member of a board of examining surgeons, and his testimony was doubtless accepted in accordance with paragraph 6, page 14, of the Treatise on the Practice of the Pension Bureau, which provides, in part, that the testimony of examining surgeons of the Pension Bureau need not be sworn to, unless the title to pension in doubtful cases rests on their evidence alone, when its execution before a proper officer may be required.

This rule appears to be frequently unobserved, both in reference to the exemption and in reference to the requirement in doubtful cases. The case under consideration is a conspicuous example of the disregard of said requirement, which should be construed as mandatory and not merely as permissive. The claim rested alone upon the testimony of Dr. Gerlach, and it would probably have been allowed upon his unsworn statements if the same had been more favorable and not in conflict with the recognized pathology.

Antedating the other by ten months, as it does, the delayed statement is not "additional" in the ordinary acceptation of the term; it is not something which the doctor added to his other statements—the statements upon which the claim was adjudicated.

Additional evidence in pension claims is that which is both executed and filed in addition to evidence which was previously executed and filed; it is also such evidence as may have been executed prior to the

adjudication of a claim if the subsequent filing thereof is satisfactorily accounted for. When testimony has been intentionally withheld after its execution and not filed until the claim has been adjudicated, it can not be regarded as additional.

The official statements of examining surgeons are only such statements as are made in their official reports or directly in connection therewith. When an examining surgeon happens also to be (or to have been) the attending physician of a soldier, and in this capacity furnishes testimony in support of any claim for pension based upon the service of said soldier, such testimony is not official in its character. While the Department is disposed to give full credit to the testimony of its examining surgeons and its other qualified officers and employees, such testimony can only be accepted as of such weight as the established facts may warrant.

It is apparent that the enlargement of the prostate gland was the primary cause of the soldier's death. It is also apparent that the pensioned disability was not a material factor in the fatal issue, either directly or indirectly.

Lumbago, or rheumatism, is not recognized as a cause of hypertrophy of the prostate gland. This affection is common to men past the meridian of life, and this soldier was about 64 years old at the time of his death. There was no probable pathological relation between the affection which was accepted as due to his military service and the disease which proved fatal after an acute illness thirty-five years later.

From this careful consideration of the evidence the Department is of the opinion that the action rejecting the claim was proper, and it is therefore affirmed.

COMMENCEMENT—ACT OF MARCH 30, 1898—SEA PAY—"THE MAINE."

HARRIET ADAMS (MOTHER).

In the case of an enlisted man killed by the explosion of the steamship *Maine*, February 15, 1898, his sea pay for one year thereafter can not be paid to his dependent parents under the special act of March 30, 1898, and a pension be allowed his dependent mother for the same year, or for any portion thereof.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 18, 1902.*

John T. Adams, formerly a coal passer on the U. S. S. *Maine*, died on the night of February 15, 1898, as the result of the explosion and sinking of the said steamship, in the harbor of Habana, Cuba.

On February 21, 1898, Harriet Adams, claiming to be his dependent mother, filed application for pension under the general law; and on

October 27, 1898, pension was allowed her, at the rate of \$12 per month, commencing February 21, 1898.

On April 4, 1898, Charles Adams and Harriet Adams, parents of said John Adams, filed claims for arrears of pay. Said claim, including the gratuity provided by the act of March 30, 1898, was allowed April 15, 1898, and subsequently paid.

On August 23, 1899, your Bureau held that, under the act of March 30, 1898, pension to Mrs. Adams as a dependent mother ought not to have commenced until February 16, 1899; that certificate would be reissued at the rate of \$12 per month from said last-named date, but that payments thereunder would be withheld until a sum had accrued sufficient to reimburse the Government for the amount erroneously paid.

From this action of your Bureau the claimant (on March 30, 1900) appealed to the Department.

The appeal contends that the action of your Bureau is not warranted by the proviso to section four of said act of March 30, 1898.

Said act provides, in its first section, for reimbursing survivors of the explosion of said steamer *Maine* for losses sustained by them to an amount not exceeding twelve months' sea pay (without rations).

Section 2 provides that, where persons were killed by said explosion, their widows, children, or (in case there be none such) parents, and if there be no parents, brothers and sisters, shall be entitled to twelve months' sea pay; provided, however, that in case any person who received reimbursement under the first section of this act should die, the amount which he had received should be deducted from the amount allowed to his beneficiary.

Section 3 authorizes the accounting officers of the Treasury to continue for a period of three months any allotments which may have been made in favor of any relatives of the degrees hereinbefore enumerated, by any of the officers and men of said steamship *Maine*.

Provided, That the amount of the allotments so continued shall be deducted from the amount of twelve months' sea pay allowed to such beneficiaries by virtue of this act.

It will be noted that care is taken to provide against duplicate payments to the deceased sailor's relatives, or payments to them upon two different grounds, covering the same period.

Section 4 reads as follows :

That the relief granted by the provisions of this act shall be in full satisfaction of any and all claims whatever against the United States on account of losses or death by the destruction of the United States steamer *Maine*; and any claim against the United States which shall be presented and acted upon under the authority of this act shall be held to be finally determined, and shall not in any manner thereafter be reopened, reconsidered, supplemented, nor be subject to appeal in any form; and the method of presenting and establishing such claims heretofore presented shall be followed in lieu of those prescribed by acts or parts of acts heretofore enacted relating to the presentation and allowance of similar claims.

The provision of the above-quoted section that the relief granted by this act "shall be in full satisfaction of any and all claims whatever against the United States," and shall not in any manner be "supplemented," might have been held as prohibiting the allowance of any pension, had it not been for the addition of the following proviso:

Provided, That nothing herein shall affect the right of any of the beneficiaries under this act to any pension to which they may be entitled under existing law after the expiration of one year from said 15th day of February, 1898.

Here again, as in section 3 of the act, care is taken to provide against duplicate payments—one under this special act and one under the general pension act.

If such be not the meaning of said proviso, it is difficult to conceive what can be its meaning. The appeal suggests no alternative construction. Such construction has received the approval of the Department in Order No. 43, of 1901, relative to beneficiaries under said act, the final sentence of which is as follows:

Pensions allowed such beneficiaries must not commence prior to February 16, 1899, as provided in section 4 of said act.

Counsel for claimant contends—

This claimant was a pensioner under the provisions of section 4707 of the Revised Statutes, in force and unrepealed at the date of the allowance of her claim; and the pensionable period of the pensioner is particularly specified in said section. This claimant can not be legally deprived of her pension for any part of the time for which she has been allowed under the statute, unless it be held that section 4 of the act of March 30, 1898, repeals the operation of the provisions of section 4707 for a period of one year from the 15th day of February, 1898, in so far as it relates to this claimant; and if it be so held, then it can only be held to do so by implication.

It is clear that Congress, not so much by implication as very explicitly, declared that the relatives of persons killed by the explosion of the *Maine*, and who receive a sum equal to twelve months' sea pay of the person killed, shall not during those twelve months receive also a pension.

Counsel for claimant further contends—

That this claimant did not receive a sum equal to twelve months' sea pay of her son. * * * The settlement was divided between this claimant and her husband.

The manifest meaning and intent of the act is that the United States Government shall not be called upon to allow sea pay and pension both, covering the same period. Besides, even if this claimant received only one-half the amount of her deceased son's sea pay she was one of the "beneficiaries" under the act, and comes within the scope and operation of the proviso.

The action of your Bureau was correct and is hereby affirmed.

LINE OF DUTY—ABSENCE FROM COMMAND—ACCIDENTAL INJURY.

JAMES D. SILMAN.

The claimant being absent from his camp, by permission to visit a nearby town, in pursuit of his own pleasure and recreation, and being injured in the right eye by an accidental blow from a fireball shot from a roman candle, during Christmas festivities in the town, was not in line of duty, and is not entitled to pension on account of such injury so incurred.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 18, 1902.*

James D. Silman, late of Company E, Sixteenth United States Infantry, filed his application for pension July 3, 1886, alleging that at Fort Concho, Tex., December 25, 1885, he received an injury to his right eye by a blow from a fireball from a roman candle, resulting in almost complete loss of sight. The claim was rejected February 3, 1887, on the ground that at the time the injury of right eye was incurred the soldier was not in the line of duty, it being shown by the records of the War Department that he was absent from his command on a pass, and it does not appear that the pass was granted for a purpose growing out of, or connected with the public service. From this action appeal was taken March 6, 1900, the contention being that the incurrence of the injury was not attributable to any carelessness or neglect on the part of claimant; that he was absent from camp at the time by permission of his commanding officers for the purpose of recreation, and said injury was purely accidental; that he was not attending any social gathering or on any expedition for personal benefit or diversion.

The claimant was enlisted December 27, 1884, and was discharged March 8, 1886, on a surgeon's certificate of disability, which recites the facts as to the incurrence and nature of the injury of right eye, on which the claim is based. In this certificate the statement of the captain of the company is as follows:

Contusion of the right eye which renders him unfit for the service. The injury was received while the man was on a pass in San Angelo, a small town in close proximity to Fort Concho, on the night of December 25, 1885, by the eye being struck by a fireball from a roman candle in the hands of some unknown person. The injury was contracted in the line of duty.

The surgeon's certificate accompanying the above is as follows:

Contusion of right eye caused by a blow from a fireball from a roman candle. The blow caused the separation of the iris from its ciliary attachment at the lower edge and also injured the eye so much that there is almost complete loss of sight. He will never be fit for duty again. In line of duty. Degree of disability, one-half.

Other evidence touching the incurrence of the injury, consisting of statements by the first lieutenant, first sergeant, and a comrade of the

company, was supplied in 1887. The first lieutenant, B. R. Steedman, certified that—

The injury was inflicted by a roman candle discharged by an unknown person during a Christmas celebration in the town of San Angelo, in the vicinity of Fort Concho, and within the limits allowed by the commanding officer. Silman took no part in the celebration, was simply walking along the street and on turning the corner received the said injury. I therefore believe that it was in line of duty.

The first sergeant, John Lenard, certified that—

I hereby certify that James D. Silman, late private, Company C, Sixteenth United States Infantry, received the injury for which he was discharged from the service in line of duty on the 25th day of December, 1885. He was not on a pass on that day.

The above certificates were not sworn to, the said officers being presumably still in the service at the time of making them.

The comrade, Thomas S. Sweeney, made the following affidavit:

On the evening of December 25, 1885, he was in company with James D. Silman, walking on the street in the town of San Angelo, Tex., in the vicinity of Fort Concho; that on turning a corner of the street Silman was struck in the right eye by a fireball from a roman candle discharged by an unknown person. The occasion was a Christmas celebration in which this deponent and Silman took no part, and that at the time he received the injury he was on his way to his company quarters to attend tattoo roll call; that said injury resulted in total loss of sight of right eye, for which said Silman was discharged from the service; that he and said Silman were not at any time on said evening outside of the limit allowed by the commanding officer of the post.

From the foregoing evidence it will be noted that there is entire agreement among the witnesses as to manner in which the injury was incurred and how the claimant was engaged at the time. There can be no doubt but such incurrence was entirely accidental and without fault or neglect on the part of claimant. There is also a consensus of opinion as to claimant being in line of duty at the time, as line of duty was regarded by these officers. That is, claimant was in the little town near the post, with full permission of the commanding officers, and was engaged in no act or conduct violative of military discipline or his duties as a soldier.

At the same time he was away from the post, the usual place where his duties were performed, and there can be as little question but he was absent for his own pleasure, in his private capacity as an individual, free to enjoy himself in whatever manner presented itself or appealed to his inclination. He was for the time excused from the performance of any duty and from being present at his post of duty. It is fair to presume that, while he may not have been actively engaged in the Christmas festivities that were going on in the little town, he was there to look on, to witness the occupations and amusements in which others were employed, and this, too, for his own pleasure or recreation, as he admits in his appeal. In this view he was not in line of duty for pensionable purposes.

Then there is the consideration that claimant's military service, or his duties as a soldier, was in no sense responsible for his injury. He was under no command to be at the place where he was hurt. He was doing nothing that could in any way be regarded as a part of his duties or as necessary to his welfare and efficiency as a soldier. The rulings of the Department have been uniform in declaring that a soldier absent from his command of his own volition merely, and not acting under any military order, is not in line of duty; also that a soldier is not in line of duty when disability is contracted while in pursuit of pleasure or absent to attend to private business.

Some of the decisions are as follows:

The line of performance of military duty must sustain to the casualty or the injury alleged the relation of cause, and the disability must be the legitimate sequence of such cause in the service. (Alexander Gillespie, 2 P. D., 16.)

Question is not whether the soldier was in line of duty at the time he received his injury in the sense that he was not disobeying any military law, rule, or regulation, or guilty of any culpable negligence, but rather what is the quality or condition of the act which produced the injury of which complaint is made. (James Harding, 2 P. D., 232.)

Whether a soldier was acting under "military authority" is not only the test of his being within the line of duty, but the purpose for which the authority was given, as to being connected with his military duties or with his own private affairs, and also whether the authority was an order or a mere permit, and the character of military duty the command was performing at the time must be considered, although if that which he was only permitted to do was in line of good military discipline and calculated to promote the interests of the service he would still be in line of duty. (William R. Johnson, 4 P. D., 167.)

It could hardly be maintained on any sort of theory that claimant's visit by permission to San Angelo, for his own pleasure, was calculated to promote the interests of the service. The case is different from that of Zenas Hamilton (3 P. D., 3), who was one of the guard at a circus, and who, while on relief, was inside the tent, when the seats fell and injured him. It is also different from the case of Henry Newman (8 P. D., 532), who was hurt while playing baseball at the camp, by express encouragement of the War Department, such sport being considered promotive of the efficiency of the men. The reasons for the allowance of pension in the two cases cited do not apply to this claimant, who was away from his command for his own recreation and in the place of danger at his own risk.

Full consideration of the facts leads to the conviction that claimant was not in line of duty when injured and is not, therefore, entitled to pension on account of said injury. The rejection of the claim was accordingly proper, and that action is affirmed.

MARRIAGE AND DIVORCE—EVIDENCE—RECORD—DURESS.

ELLEN DEVENING (ALLEGED WIDOW).

The evidence shows that the claimant was lawfully married to one James Holleran (who is still living) prior to her marriage to the soldier, and fails to show that said prior marriage was ever legally annulled or dissolved. It is therefore held that her marriage to the soldier was invalid.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
July 25, 1902.*

The appellant, Ellen Devening, was, in April, 1893, granted a pension under the act of June 27, 1890, as the widow of William F. Devening, deceased, formerly a soldier in Company B, Twenty-first New York Infantry.

On January 13, 1900, her name was dropped from the pension roll on the ground that her marriage to the above-named soldier was invalid, it being shown that at the time of said marriage she was the wife of another man. From that action an appeal was taken March 5, 1900.

The appellant was married to the soldier under the name of Ellen Ragan, in Wyoming County, N. Y., July 16, 1866, by a justice of the peace, and lived with him ostensibly as his wife until his death on May 26, 1886. She admits that "a long time before that" she went through the form of marriage with one James Holleran, but insists that it was not a legal marriage, as she was only a child at the time and was forced into it by her father, and never lived with Holleran or occupied the same bed with him—in short, her contention is that the marriage was void by reason of the fact that she was not of suitable age, by reason of the fact that she did not freely consent to it, but acted under duress, and by reason of the fact that it was not consummated.

It is further contended that a decree of court setting aside or annulling said marriage was obtained by Holleran prior to her marriage to the soldier, though of this she has no personal knowledge, but alleges it upon information and belief.

The evidence material to the issue is as follows:

Kate McElroy, being duly sworn by a special examiner, on September 14, 1899, stated:

I have known Ellen Devening all my life. She is related to me—a second or third cousin. She was first married to James Holleran, in Hornellsville, N. Y., by some Catholic priest. I don't recall just when it occurred. I was not present at the marriage, but I knew it to be a fact. I know they lived together for a while as man and wife, but how long I could not say. She ran away and left him quite a number of years ago, I could not say just how long. They were living on his farm in the town of Birdsall at the time. I suppose she left him because he was so much older than she and she was inclined to be giddy. After she left him she lived in different places and came to Hornellsville about twelve or thirteen years ago. I knew Wil-

lian F. Devening very well. I knew of the fact that he lived with this woman who now draws pension as his widow at Angelica, N. Y., but whether or not they were ever married I could not say. I never heard that this woman had ever been divorced from Mr. James Holleran, her first husband. It has been commonly talked in Birdsall that they were never divorced, and the general idea is that she ought to have been prosecuted for bigamy. * * * I was advised to call attention to this by Margaret Mitchell, a sister of Ellen Devening, because Ellen Devening has separated my husband from me by persuading him to go to the Soldiers' Home, because I would not sign my property over to him.

James Holleran, being duly sworn, on October 23, 1899, testified:

I was married to Ellen Ragan about forty-three years ago, at Hornellsville, N. Y., by Father Keenan, in the Catholic Church. We lived together from the time we were married, which was just about New Years, until about the following April. She lived most of the time at her father's house, and I was at work, but used to get back there every Saturday night. She left me and went off, and her uncle, John Ragan, told me that she had gone with a man named Ryan, but of that I know nothing personally. Some three or four years after she left me I got a divorce from her. Harlow Hakes, of Hornellsville, was my lawyer, and Joseph Gillis served the papers on her. I paid Mr. Hakes \$50 for getting the divorce. I did have the papers, but I think my daughter destroyed them some time ago—I think this last spring. They ought to be on record. The suit came off at Corning. The ground I got the divorce on was that she was living with this man Ryan, at Buffalo, and was keeping a bad house there. The divorce was actually granted and was all right. I paid Mr. Hakes at the time he gave me the divorce papers, and he said they were all right, and I supposed they were recorded. I think now, as near as I can remember, I got the divorce about the last of the war.

On October 31, 1899, Mr. Holleran further testified that he was first married in Killrush, Clare County, Ireland, to one Margaret Leonard, who died about three or four years before he came to this country; and that the only thing he got from Lawyer Hakes was one paper, which he understood was the decree, and supposed everything was all right and recorded.

John L. Holleran, being duly sworn, on October 21, 1899, testified:

My father's name is James Holleran. He now lives near Hiltonville, Allegany County, N. Y. He came to this country from Scotland about forty-six years ago. My mother, who was his first wife, had died prior to that time. She died when I was about 8 years old. * * * I came to this country with my aunt, Mrs. Jane Griffin, about three years after my father did and lived with him for a time in Washington County, N. Y., and then I went to Almond to my aunt and my father followed later. Before he got to Almond the Griffins and the Ragans got up the matter between my father and Ellen Ragan before they had seen one another, supposing that my father had money. The girl was about 16 and was practically forced to marry my father. They did not live together any to speak of. She left and went away somewhere. I could not swear that there was a divorce granted, although I believe there was. I know that it was taken to court somewhere and that my father was put to considerable trouble and expense about the matter. I don't know in what court or in what county it took place. * * * All I know of it is what I have heard from my father and other relatives in the way of conversation. * * * Sometime after Ellen left him—I think in 1859 or 1860—my father was again married to Catharine Kinney, with whom he lived until she died about a year ago.

Margaret Mitchell, being duly sworn on September 14, 1899, testified:

Ellen Devening is my sister. Her maiden name was Ellen Ragan. She was married to James Holleran in the January previous to her becoming 15 years of age in June. She was 56 years old last June. I was not present at the marriage. They never lived together at all. She left him the day after they were married and for a long while our folks did not know where she was. It was a sort of forced marriage. She thought she had to do what her parents told her. They were married here in Hornellsville by some Catholic priest. I don't know his name.

"Q. Why did you testify in her case that she had not been married prior to her marriage to Devening?"—A. Because I did not know that she was married. They all said she was, but I did not know it because I was not present and did not see them married. Since I came here from Buffalo about eleven years ago, Joseph Gillis (now dead) told me that there was quite a trial here about the matter and that the court had decided that my sister was free and that she was not lawfully married to Holleran. She never used the name of Holleran—always went by the name of Ellen Ragan until she was married to William F. Devening. * * * Mr. Holleran was married afterwards and had two children, and as my sister married also, I am satisfied they must have been lawfully separated. * * * I did not know anything whatever about the alleged marriage of my sister and James Holleran until I was told of it by Joseph Gillis about eight years ago. That was the time he told me that the court freed my sister from Holleran.

Ellen Devening (the appellant) testified:

I went through the form of marriage with James Holleran, but I never considered it a legal marriage, as I was forced into it by my father, and I never lived with him at all—never even occupied the same bed with him. For a while after this marriage I lived at home with my father and Holleran used to come around occasionally, I presume to see if I was ready to go and live with him. I had such a horror of him that whenever he came near me I would almost have a fit. I never slept with him and the marriage was never consummated. I told my father that I would kill myself rather than live with Holleran, and my father knew me well enough to know that I would keep my word, and he never insisted on our living together.

"Q. What were the circumstances of your being married to Holleran?"—A. I was working at Angelica, N. Y., for Ransom Lloyd and wife (both deceased) and was a little over 14 years of age. My father came after me and took me home to Birdsall. The next day after breakfast (it was Sunday) he said to me: "There is a man coming here to-day that is going to ask you to marry him, and I want you to say yes, or, if you don't, after he has gone I will kill you." James Holleran came during the forenoon—that was the first time I ever saw him. While at dinner he asked me if I would marry him, and I looked at my father, who was watching me, and as I dared not say anything else I said yes. I did not see him again after that day until the day I came to Hornellsville, some two or three weeks later. The marriage took place at the Catholic church here and the ceremony was performed by some priest. I don't know who he was. I don't know what year it took place, but it was in January, about forty years ago. I know I would not have been 15 years old until the June following. I went home to Birdsall that day and stayed at my father's house. I don't remember where Holleran went. He may have stayed at my father's also, but he did not sleep with me. I never took any steps to have the marriage set aside, as I never considered it was legal. I was forced into it through fear of my life and I was under age and never considered that I was married to Holleran. I never used the name Holleran at any time. I always went by the name of Ellen Ragan, which was my maiden name, until my marriage to Devening.

"Q. Were you ever served with any divorce papers at any time?"—A. No, sir. I don't know anything about such a matter. I heard my sister, Mrs. Mitchell, say that Joe Gillis (deceased) told her that there was a big trial somewhere about Holleran and his marriage to me and that he was present and heard all the evidence, and that the case was thrown out of court because I was forced into the marriage and was nothing but a child at the time. All that I know about that matter is what my sister told me. Outsiders knew that I detested Holleran and would never mention his name to me.

"Q. Why did you not mention this marriage when making application for a pension as widow of William F. Devening?"—A. Because I never considered I was married to Holleran. I made some inquiries lately and found out that the Catholic Church does not consider the marriage legal. I was perfectly honest in making my application. I did not look upon the ceremony with Holleran as a marriage and I considered that I was legally free and entitled to marry Devening, and since his death I have always considered myself the legal widow of William F. Devening.

* * * I never went off with a man named Ryan. * * * I never lived in the same house with a man of the name of Ryan.

The first question to be considered is, was the marriage to Holleran a valid marriage under the laws of New York?

Three reasons have been assigned by the appellant for regarding it as invalid: (1) That she was under age; (2) that she did not freely consent to the marriage, but was forced into it through fear of her life; and (3) that the marriage was never consummated.

Under the common law infants might marry—males at the age of 14 years and females at the age of 12—even without the consent of their parents, and the rules of the common law in this respect were declared by the supreme court of New York, in 1856, to be in full force and effect in that State, with the exception that by the laws of 1841, chapter 257, the courts were authorized to annul marriages where the female was; at the time of the marriage, under the age of 14. (*Bennett v. Smith*, 21 Barb., 439.) Such appears to have been the law at the time of the appellant's marriage to Holleran. As she admits that she was over 14 years of age at that time, it is clear that said marriage was not void, or even voidable, by reason of her age.

The assertion of the appellant that her father threatened to kill her if she refused to marry Holleran is not corroborated in any way, and with the exception of the younger Holleran's statement that she was "practically forced" to marry his father (which statement does not appear to have been based upon personal knowledge), there is no evidence, outside of her own testimony, that she did not consent to the marriage. Duress, such as would invalidate the contract, is not established by evidence that she married unwillingly, unless it be shown that she was forced by fear of bodily harm. (*Stewart on Marriage and Divorce*, sec. 83.) As has been stated, there is no evidence that she was coerced by threats of bodily injury except her own statement, which, for obvious reasons, is not sufficient.

Her statement that the marriage was not consummated is likewise

uncorroborated. The evidence tends to show that she and Holleran lived together for a short time, and the presumption would be that they had intercourse. The point is immaterial, however, as consummation is not essential to the validity of a marriage formed by celebration. (Am. and Eng. Enc. of Law, vol. 14, p. 518; *Jackson v. Winne*, 7 Wend. N. Y., 47.)

After careful consideration the Department is unable to find any facts shown in evidence that would have rendered the appellant's marriage to Holleran invalid under the laws of New York. It must be held, therefore, to have been a valid marriage and to have constituted an impediment to her lawful union with the soldier unless previously annulled or dissolved by a court of competent jurisdiction.

This brings us to a consideration of the alleged divorce.

On this subject the special examiner in his report says:

There is no record whatever of any proceedings, either of divorce or of any other character, between these parties in either Steuben or Allegany counties. After Holleran had stated that the proceedings took place in Corning I made a second search in the records of Steuben County, but again with a negative result. Harlow Hakes, who appeared for Holleran, died about three years ago. His books and dockets are in the possession of Mr. Shirley Brown, an attorney of Hornellsville. Careful search among them fails to reveal anything relative to this case. One docket covering 1864 to 1872 is missing. It was customary then, and still is, to a certain extent, for the attorney securing a judgment to hold the judgment roll and the decree without recording the same until the fees due were paid by his client, and then to hand them to his client to have them recorded. * * * I talked with Mrs. Martin (Holleran's daughter), who absolutely refused to testify, and she could give no definite information regarding the nature of the papers burned by her. All she could say was that they related to some divorce proceedings between her father and the pensioner. Up to that time she had been kept in ignorance of that marriage, and was so annoyed about it that she did not want the papers in the house and, thinking that they were of no further use, burned them. Joseph Gillis, who was said to know all about the case, died about three years ago. As both Holleran and the pensioner again married, and for a number of years lived only about five miles apart, it was generally understood that the marriage between them had been set aside. A number of people who knew them expressed that belief and understanding, but I could not find nor could I learn of any who had personal knowledge of the nature of the decree setting aside the marriage, the grounds on which the same was obtained, or where, or when.

The proper evidence to establish a divorce is the record of the decree of the court granting the same, and until the absence of such a record is properly accounted for other evidence can not be properly considered. Assuming that the judgment roll and the decree in this case were not recorded for the reason suggested by the special examiner, that would not account for the absence of record of the preliminary proceedings for divorce. There is no proof that any of the public legal records of Steuben County, N. Y., have been lost or destroyed. The appellant admits that she received no notice of the commencement of a suit for divorce and had no knowledge that such

a suit had been instituted and a decree rendered until many years afterwards, although at the time of the alleged proceedings she appears to have been living in an adjoining county. It is altogether improbable that a legal divorce could have been procured in the State of New York under such circumstances, and from all the evidence in the case the Department is convinced that there was no divorce. The case, in this respect, is not materially different from that of Mary C. Orr, decided on appeal October 21, 1899, and reported in 10 P. D., p. 348.

For the reasons above stated it must be held that the marriage of the appellant to the soldier was void and that her pension as his widow was properly terminated. The action is affirmed.

MARRIAGE AND DIVORCE—LAWS OF KENTUCKY.

MAGGIE MERRIMAN (WIDOW).

As claimant had a husband living when she married the soldier, such marriage was void, and as a common-law marriage is not sanctioned by the laws of Kentucky, no marriage between claimant and soldier subsequent to the removal of the impediment to their marriage can be presumed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 7, 1902.

Maggie, as widow of Harvey Merriman, formerly private, Company H, Nineteenth Kentucky Volunteer Infantry, filed a claim for pension under the act of June 27, 1890, June 18, 1897, which was rejected May 27, 1899, in the following stated language:

Approved for rejection on the ground of claimant's inability to prove that she is the legal widow of the soldier, she having a former husband from whom it does not appear she had been legally separated.

A claim under the general law was filed in 1898 and was rejected for the same reason as above, and consequently the two claims need not be separately considered.

Some additional evidence was filed after the above rejection, but it was not considered material, and on January 13, 1902, the claimant filed an appeal to the Department. May 28, 1902, the Department returned the papers to the Bureau with instructions to conduct a special examination of the issue presented. This was done, and on July 11, 1902, the former rejection was adhered to, and the papers are now before the Department for final action on the appeal.

The facts in the case, as shown by the evidence, are substantially as follows:

The claimant and one Enoch Lewallen were married in May, 1860, and lived together as man and wife until sometime in 1868 (probably, the exact date not appearing) when he deserted her. The claimant

testified that he left her to go to "mill" and never returned. The great preponderance of the evidence establishes that Lewallen was of a roving disposition, and had on one or two occasions, prior to his last leaving, deserted her, but had returned after an absence of some time. On one occasion he took his child from his wife and attempted to run away with it, but the claimant went after him and secured the child.

The evidence is clear that Lewallen's relatives knew of his whereabouts at the time the claimant married the soldier, and for some months afterwards.

It is not clear just what issue is raised by the appeal, but it may be inferred that claimant has sought to establish that her first husband was dead when she married the soldier, on April 22, 1875. The evidence shows, beyond any doubt, that he was alive and his whereabouts known to his relatives for several months after said date.

Just here this inquiry may end. The marriage in issue has been shown to have been void. The claimant may have and undoubtedly did marry the soldier in good faith, believing she had capacity to marry, but this good faith does not alter the facts in the case.

The evidence shows that the claimant lived with the soldier in the State of Kentucky, where she married him, from the date of said marriage until his death in 1897, a period of over twenty-two years.

In some States of the Union a common-law marriage may be presumed, under certain circumstances, after the removal of an impediment which rendered a ceremonial marriage void. This is not true in the State of Kentucky.

Chapter 52, paragraph 2, and subdivision 4 of the Revised Statutes of Kentucky provides that marriages "when not solemnized or contracted in the presence of an authorized person or society" are void.

In other words, a marriage at common law is not recognized in the State of Kentucky.

In the case of *Estill v. Rogers* (1 Bush. Ky., 64) the supreme court of Kentucky held as follows:

But since the adoption of the Revised Statutes (1852), there can be no such thing as legal marriage by cohabitation and recognition alone; and all marriages not solemnized or contracted in the presence of an authorized person or society are void.

See also the case of *Nannie Roach* (7 P. D., 80).

The act of August 7, 1882, declares that marriages in pension cases shall be proved in accordance with the law of the place where they were contracted, or of the place where the right to pension accrued.

Under the law of Kentucky this claimant would not be recognized as the widow of the soldier, and consequently has no title to pension.

The action of the Bureau from which appeal was filed is affirmed.

FEE—REFUNDMENT—FRAUD.

THOMAS WEBSTER (CLAIMANT).

JOSEPH H. HUNTER (ATTORNEY).

Where pension has been fraudulently obtained, the attorney who prosecuted the claim, without knowledge of the fraud, can not be required to refund the fee paid him for his services in securing the pension allowed. The case of Elizabeth Striggon (8 P. D., 12) is overruled.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
August 7, 1902.*

Joseph Hunter, of Washington, D. C., on May 26, 1902, entered an appeal from the action of the Bureau in the matter of fee on the issues of June 23, 1888, and March 28, 1890, in the claims for original invalid pension and for increase under the general law, respectively, of Thomas Webster, who served in Company B, Eighteenth Kentucky Volunteer Infantry.

Certificate issued June 23, 1888, in the soldier's claim under the general law to allow him pension at \$8 per month from December 2, 1882, on account of disability due to injury of left elbow. On said issue the appellant, who was the attorney of record in the claim, was paid a fee of \$25.

Also certificate issued March 28, 1890, to allow the soldier the rate of \$14 per month on account of increase of said disability, from August 7, 1889, date of medical examination. On said issue a fee of \$10 was certified to the appellant, who was the attorney of record in the claim for increase. Subsequently by special examination it was shown that the cause of disability, injury of left elbow, on account of which pension was allowed, was not incurred in the service, but existed prior to enlistment, and on October 26, 1897, the soldier was given thirty days in which to show cause why his name should not be dropped from the rolls. At the same time he was further advised that his claim for pension under the act of June 27, 1890, was ready for allowance at the rate of \$12 per month from September 6, 1901, date of filing declaration; that certificate would issue under the act of June 27, 1890, to allow such pension and payment thereof be withheld until such sum had accrued which had been erroneously paid him under the general law, less the sum of \$35 paid as attorney fees. He filed evidence which was not deemed sufficient to rebut the evidence obtained on special examination, and on January 3, 1898, the United State pension agent at Louisville, Ky., was advised to drop his name from the rolls. Certificate issued September 6, 1901, to allow him pension under the act of June 27, 1890, as above set forth, the payments of which are being withheld to reimburse the Government for payments of pension

made to him under the general law. The appellant has been called upon to refund \$35 which was paid to him as attorney in the soldier's claims under the general law; hence this appeal.

There is nothing in the case tending to show that the appellant had any knowledge that the claim was fraudulent.

In the case of Elizabeth Striggon (8 P. D., 12) the Department held (syllabus) that—

An attorney's title to fee is dependent upon his client's title to pension, and where the pension was fraudulently obtained the Commissioner of Pensions may require the refundment of the fee paid the attorney who prosecuted the claim, as well as the pension so paid the claimant.

The appellant in his argument seeks to distinguish the present case from the Striggon case upon the facts, but in the two cases they are similar in all essential particulars. However, the conclusion is reached that the decision in the Striggon case does not set forth the law applicable to the facts.

When a duly authorized attorney has secured for a claimant an allowance of pension, his title to a fee for his services, to the time of the payment of the fee to him, is dependent upon his client's title to the pension allowed. The fee is paid from the pension secured, and it is quite manifest that if his client has no title to pension, he has no title to a fee; and thus, before payment of pension is made, the attorney's title to a fee is dependent upon his client's title to pension. In the Striggon case it is considered where payment of a fee has been made to an attorney, as the law provides, out of the pension allowed to the claimant, that the former's title to the fee is still dependent upon the latter's title to pension.

It is not thought that this conclusion is warranted unless it is assumed that under the pension laws an attorney is a cosharer with his client in the pension allowed in a claim. The pension laws, it is true, impose conditions with respect to the amount and the method of making payment of fees in pension claims, viz, that the amount shall not exceed \$10 or \$25, as the case may be, and that the fee shall be paid by the Commissioner of Pensions; but by these provisions no pensionable rights are conferred upon attorneys, nor has it ever been held by the Department that an attorney is a cosharer with the claimant in the latter's pension. On the contrary, it was held, in substance and effect, in the case of Harvey Harrington (12 P. D., 109), that in contemplation of law the entire pension allowed in a claim is paid to the claimant, and that as his agent the Commissioner of Pensions pays the fee to an attorney for services rendered.

In fact, the conditions imposed by the pension laws relative to the amount and the method of making payment of fees in pension claims are limitations upon the common-law rights of claimants and attorneys to make contracts with respect to those matters. The amount paid to

an attorney is paid to him by the Commissioner of Pensions not as pension granted by an act of Congress, but as a fee for services rendered, and pursuant to the terms of a contract such as he and the claimant are permitted to enter into under the pension laws. It is clear that the title of an attorney and a claimant to the money which they respectively receive as fee and pension is founded on entirely different considerations, and the pension laws under which a claimant derives title to money paid him as pension are in no way applicable to the attorney's title to the money paid to him as a fee. It is thought that the title of an attorney to a fee paid to him through the Commissioner of Pensions rests upon the same grounds as does the title of any other creditor of the claimant to money paid directly to him on indebtedness by the claimant out of the pension money which he has received. It never has been considered that the Government has any right to recover in the latter instance from the creditor the amount paid him by the claimant, though the money paid was procured from the Government through the prosecution of a fraudulent claim for pension, and it is not apparent upon what legal grounds it can recover the fee paid to the attorney by the claimant for services rendered, although the fee was paid through the agency of the Commissioner of Pensions as the law directs. It is not thought that the method of payment of fee distinguishes the title of the attorney to the fee paid to him from the title of any other person to whom money is paid by the claimant on indebtedness and out of the pension money received, and there is no provision contained in the pension laws which is authority for requiring an attorney to refund a fee paid to him for services rendered in a claim for pension, for the reason alone that his client had no title to the pension allowed.

Accordingly the action of the Bureau is reversed, and the decision of the Department in the case of Elizabeth Striggon, *supra*, is overruled.

As there is no suggestion that this appellant has any knowledge that the soldier's claim under the general law was fraudulent, the question will not be discussed as to what action would be proper if he had such knowledge when he was prosecuting said claim.

PATHOLOGICAL SEQUENCE—ASTHMA AND CEREBRAL HEMORRHAGE.

PHILENA E. TIBBETTS (WIDOW).

The appellant's husband was a pensioner on account of asthma, among other causes, and died of cerebral hemorrhage during an unusually severe paroxysm of said disease.

Held, That the increased intravascular pressure caused by the asthma produced the fatal hemorrhage.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
August 7, 1902.*

Philena E., widow of Joseph Tibbetts, formerly a private in Company C, Second Massachusetts Volunteer Heavy Artillery, and an armorer, United States Navy, filed, September 24, 1895, a declaration for widow's pension under the general law. Said claim was rejected January 23, 1896, on the ground that his death resulted from apoplexy, not shown due to causes for which he was pensioned, namely, asthma, disease of throat, disease of lungs, and impaired hearing.

An appeal was entered from this action by the attorney of record April 25, 1900, contending the fatal apoplexy was the result of the diseases for which the soldier was pensioned, and that the evidence shows that the apoplectic seizure occurred during a severe asthmatic paroxysm. The attending physician's affidavit as to the cause of death is set out in the appeal.

Said physician, Dr. F. J. Schliemann, testified in relation to the case as follows:

I was the family physician for several years of the above claimant (soldier), who was chronically affected with bronchitis and asthma, and at the time when he was seized with the apoplectic stroke he was suffering from an unusually severe attack of asthma, which, commencing the day before, was in full force at the time when the cerebral hemorrhage occurred, causing his death.

I am positive that the long continued strain of the last asthmatic attack caused the cerebral hemorrhage, which in turn resulted in death.

In a later affidavit this physician stated, in explanation of the cerebral hemorrhage, that—

* * * The intense dyspnea of the attack caused a very high arterial tension, which was followed by rupture of an artery, and the consequent hemorrhage of the brain.

It thus appears that while the soldier was suffering from an unusually severe attack of asthma there occurred a rupture of a cerebral vessel. This accident appears to be not an uncommon occurrence in asthma, as indicated in the following statement in Barthelow's Practice of Medicine:

Asthma is an essentially chronic disease not incompatible with long life, and with good, even vigorous, health during the intervals between the seizures. * * * Of itself is never fatal to life, but changes in the organs are gradually affected by the disturbance in the respiratory function, which may cause death. Emphysema, dilated right cavities, dropsy, or cerebral hemorrhage may be brought on by the long continued operation of the cause.

The Department has had occasion to state in other cases involving cerebral hemorrhage that it appears to be a pathological fact that the morbid condition underlying such an accident, which is not due to an injury of the skull, is invariably disease of the blood vessels of the brain, and that it was impossible to rupture a healthy artery by any

ordinary physiological or pathological disturbance, and that consequently the fundamental facts concerning the pathology of cerebral hemorrhage are those which pertain to arterial disease.

The author quoted says that "cerebral hemorrhage may be brought on by long continued operation of a cause," such as, for example, "disturbances in the respiratory function" by asthma.

In the case of Mary E. Dolan (11 P. D., 62) the Department held that—

When it is shown that a disability of service origin was a predisposing factor in the death cause, although so connected with other causes that the particular or specific contribution of each disease in the actual cause of death is not determined from a medical standpoint, then such disability may be accepted as the cause of death, provided the evidence shows that the service disability was so great a contributing factor that but for such service disability death would not have ensued.

Of course it may be said that the arteries of the soldier's brain did not become diseased by reason of asthma or by any other cause for which he was pensioned, but it is certain that intravascular pressure can be so much increased by a paroxysm of asthma as to cause the rupture of an already diseased artery. It is stated by the attending physician that the soldier was suffering at the time of the cerebral hemorrhage (apoplexy) with an unusually severe attack of asthma. In other words the asthma was a menace to life under such circumstances, namely, arterial degeneration. And, furthermore, there is nothing in the case to indicate that the disease of the arteries of his brain would probably in itself have proved fatal.

The adverse action in this case is accordingly reversed.

The appellant is now a pensioner under the provisions of the act of June 27, 1890, by certificate No. 11562.

MARRIAGE AND DIVORCE—DECREE NISI—LAWS OF MASSACHUSETTS.

HANNAH J. BILLS (WIDOW).

Appellant was, prior to her ceremonial marriage to the soldier, married to one Erasmus Holmes, and on her libel was granted a decree of divorce from bed and board against him in the State of Massachusetts. It is not shown that such decree was ever made absolute, or that said marriage had been dissolved. Therefore her marriage to the soldier while said Holmes was living was void and she is not his widow.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
August 7, 1902.*

This appellant, Hannah J. Bills, on September 16, 1896, filed a claim, No. 640717, for pension under the act of June 27, 1890, as widow of Otis Bills, who was a member of Company B, Seventh New Hampshire Infantry, from September 23, 1861, to December 22, 1864, and who died September 1, 1896.

Said claim was rejected in March, 1900, on the ground that claimant is not the soldier's widow, she having never been divorced from the bond of matrimony with a prior husband, who is yet living.

In this appeal filed April 30, 1900, the claimant contends that she was, in fact, divorced from said former husband by a decree rendered three years prior to her marriage to the soldier, which decree became absolute, she says, six months after its rendition, without any further legal proceedings.

It is shown herein that on May 28, 1868, the supreme judicial court of Massachusetts for Middlesex County granted to appellant, on her libel, a decree of divorce "from bed and board" against Erasmus Holmes. It is not shown that said decree was ever made absolute, or that any application to have it made absolute was ever presented to the court, and no further proceedings in that case or in the subject-matter thereof appear to have ever been taken by either of the parties thereto.

On May 31, 1871, appellant married the soldier in Nashua, N. H., and they lived together as husband and wife until his death. On October 2, 1871, said Erasmus Holmes also remarried in Tyngsboro, Mass., and is yet living.

The act of Congress approved August 7, 1882, provides that—

Marriages, except such as are mentioned in section 4705 of the Revised Statutes, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued.

It appears that appellant was married to this soldier, and at his death was living in the State of New Hampshire, by the laws of which a second marriage while a first husband or wife is living and known to be alive is declared to be "absolutely void without any decree of divorce or other legal process." (Pub. Stat., 1860, ch. 173, sec. 1; 1901, ch. 175, sec. 1.)

The validity of her marriage to the soldier depends, therefore, upon the legal effect of the decree of divorce granted her in the State of Massachusetts on May 28, 1868. As seen, said decree was one of divorce only from bed and board, and not from the bond of matrimony, and it appears to have been granted in entire accordance with the law then in force (Gen. Stat., 1860, ch. 107, sec. 9), which was repealed, however, on June 23, 1870 (Sup. to Gen. Stat., 1860 to 1872, ch. 404, sec. 5), section 1 of the act of that date providing that "all parties now divorced from bed and board shall be in the same legal condition as if divorced nisi under the provisions of this act." And section 2 of said act of June 23, 1870, then made causes for divorce from the bond of matrimony the same causes which had theretofore, under the General Statutes, entitled only to divorce from bed and board, while section 3 provided that in the cases mentioned in said

section 2 the court might after three years and should after five years from date of decree nisi, upon proof of the separation of the parties since that date, make such decree absolute as a decree from the bond of matrimony.

The supreme court of Massachusetts, construing these statutes, has held that a decree of divorce from bed and board under the original General Statutes, or a decree nisi under the act of 1870, did not sever the marital bond, and that a remarriage by either party would be void, even though entered into in good faith and an honest belief in a right to remarry, and even though entered into after the period of separation mentioned in the law; as there must be in such cases, to sever the bond of matrimony, a formal petition to make absolute a decree from bed and board or a decree nisi, and a final decree declaring the former to be absolute. (See *Graves v. Graves*, 108 Mass., 314; *Edgerly v. Edgerly*, 112 Mass., 53; *Sparhawk v. Sparhawk*, 114 Mass., 355, and 116 Mass., 315; *Fox v. Davis*, 113 Mass., 255; *Wales v. Wales*, 119 Mass., 89; *Moors v. Moors*, 121 Mass., 232; *Pratt v. Pratt*, 157 Mass., 503; *Darrow v. Darrow*, 159 Mass., 262.)

It is apparent, therefore, that this appellant has never been divorced from the bond of matrimony existing between her and Erasmus Holmes; that same still exists, and that, under the laws of the State of New Hampshire, her marriage to the soldier was void. She is not, accordingly, the latter's widow, and her claim for pension was properly rejected.

Rejection is affirmed.

MARRIAGE—SLAVES IN KENTUCKY.

MARTHA MADDOX (CLAIMANT).

Claimant and soldier, residing in Kentucky, never having ratified their slave marriage, entered into that state in 1858, according to the act of February 14, 1866, of the legislature of said State, the same was not valid, and she has no pensionable status as the widow of said soldier.

See cases of *Nannie Roach* (7 P. D., 80); *Mary Riddle* (10 P. D., 441); *Eliza J. Ellis* (12 P. D., 159); *Estill v. Rogers* (1 Bush, Ky., 62); and *Maria Meritt* (10 P. D., 157).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
August 7, 1902.

Martha, as widow of Samuel Maddox, formerly a corporal in Company G, One hundred and sixteenth United States Colored Volunteer Infantry, filed her declaration under the act of June 27, 1890, on May 1, 1899, claim being rejected on April 10, 1900, on the ground that she was not married to the soldier until after the passage of the act in question. An appeal having been filed on October 27, 1900, the case was again reviewed by the Bureau. The original rejection was made

under an opinion of the chief of the law division, and on July 9, 1902, he was requested by the chief of the board of review to render another opinion in the matter. It was the opinion of the last named individual that the claimant had title. A second opinion was rendered by the chief of the law division on July 19, 1902, a copy of said opinion being as follows:

I have considered the above-entitled claim, conformably with your request for a review thereof contained in your letter of the 9th instant, and find as facts the following:

It appears that soldier and claimant, both being slaves, were married in Kentucky about 1858 by a customary ceremony. They lived together as husband and wife and appeared to have been known and treated by their friends and acquaintances as such during slavery and after their emancipation up to November 6, 1892, when they were formally married in Lee County, Ky., and thereafter until the soldier's death, which occurred in that State January 25, 1902.

The soldier, in marriage circular filed February 7, 1898, states that his wife's name is Marthey Maddox; that he was married to her in slave times forty years ago; that no record of said marriage exists; that he was also remarried to the same woman in 1892 by Charles Francis Beatty, in Kentucky, and that there is a record of the said marriage in the county clerk's office at Beattyville.

It appears from the testimony that claimant and soldier, subsequent to their emancipation, understood that a law had been passed requiring all slaves to marry, and with the idea of ratifying and legalizing their said former slave marriage in conformity with said law, they appeared before a representative of the Bureau of Refugees, Freedmen, and Abandoned Lands, and acknowledge themselves to be husband and wife, etc. There is a certificate of said declaration filed in evidence which has every appearance of authenticity, but as no record of said marriage appears upon the records of the above-stated bureau in the War Department, the certificate referred to was not accepted as evidence of a marriage of these parties "under the flag."

In view of these facts you present the question as to whether the ceremonial marriage of these parties in 1892 can be accepted as complying with the act of the Kentucky legislature of February 14, 1866, which provides as follows:

"All negroes and mulattoes who have heretofore lived and cohabited, and do now live together as husband and wife, shall be taken and held in law as legally married and the issue held as legitimate for all purposes: *Provided*, Such persons shall appear before a clerk of the county court of their then residence and declare that they have been and desire to continue living together as husband and wife, when, upon receipt of a fee of fifty cents, the clerk shall make a record of such declaration, and for an additional fee of twenty-five cents shall furnish the parties with a certificate of said declaration. Said record or certificate shall be evidence of the existence of the marriage and the legitimacy of the issue born or to be born to said parties: *Provided*, The issue of customary marriages of negroes shall be held legitimate."

The Department, in construing the foregoing law in the case of Maria Merritt (10 P. D., 157), has held that—

"A slave marriage in Kentucky is not valid unless declared in conformity with the act of February 14, 1866, of the legislature of that State." (See decisions in the cases of Nannie Roach, 7 P. D., 80; Mary Riddle, 10 P. D., 441; Eliza J. Ellis, c. s., 42.)

In the present case claimant and soldier failed to ratify their slave marriage in strict conformity with the provisions of the act of the Kentucky legislature of February 14, 1866, but it would appear manifest from the declaration made by these parties before a representative of the Freedmen's Bureau on June 13, 1866, that said declaration was made with the intention of ratifying their former slave marriage, and

that their marriage by due form of law in 1892 was intended as a compliance with the provisions of said law. These parties have failed to meet the technical requirements of the act of February 14, 1866, *supra*, but I am of the opinion, inasmuch as their intention was manifestly a compliance with the spirit if not with the letter of said law, that in view of their long and continued cohabitation as husband and wife for a period of forty-one years, that said marriage may and should be accepted as a confirmation of their prior subsisting slave marriage under the provisions of the act of the Kentucky legislature of February 14, 1866, and claimant regarded as having status as the lawful widow of the soldier, and it is so held.

The case is now before the Department with the suggestion that the appeal be dismissed upon the ground, practically, that the Bureau recognizes title in the claimant.

This Department has had occasion, more than once, to pass upon the status of a claimant who claims by reason of a slave marriage, not ratified according to the act of February 14, 1866, of the State of Kentucky; and it has, so far as it is within the knowledge of the Department, never varied regarding the law of the matter.

Estill v. Rogers (1 Bush—Ky. —62) is the leading opinion upon the issue decided by the supreme court of the State of Kentucky, and the opinion in said case appears to have been uniformly and consistently followed by said court and by this Department. It says, in express terms, that since the revised statutes (1852) of the State of Kentucky, a common-law marriage has not been good in that State, and

The policy as well as the letter of the provision applies especially now to free colored persons, since all of all colors are equally free and constituent elements of the same community. As to free colored persons, the act of February 14, 1866, provided that their cohabitation and recognition as husband and wife may be legalized as marriage by their declaration before the clerk of their county "that they have been and desire to continue living together as husband and wife." Construed according to its letter and context, this enactment imports that without compliance with its prescribed requisition no such union can be itself legal marriage. Without conformity to this statutory mode there is now no law in Kentucky to legalize cohabitation and recognition alone as marriage, the common and only law to that effect having been repealed.

It needs no further argument to show that under the laws of Kentucky no slave marriage can be ratified, nor any procedure had for the purpose of ratifying a former slave marital status, save by a strict compliance with the terms of the act of February 14, 1866. There is very little doubt but that these parties intended to ratify their former slave marriage when they appeared before the agent of the Government already mentioned, but inasmuch as this agent had no power whatever under any law to ratify a slave marriage the attempted ratification was futile. The marriage of the parties in 1892, according to the record on file, was perfectly valid as a marriage pure and simple, but it had no effect whatever toward ratifying any former slave marriage, for the reason that it did not conform in any particular to the act of February 14, 1866.

The law in the case may be summed up by stating that the slave marriage of the parties interested was null and void, but that, by a

fulfilment of the terms of the act of February 14, 1866, such a slave marriage would have been held good and valid from its inception. The parties never did comply, either in spirit or in letter, with the terms of said act, and therefore their slave marriage was never ratified. The only valid marriage which ever took place between them was that which occurred over two years after the passage of the act of June 27, 1890.

It is the settled doctrine of the Department that the marital status of claimant must be determined by the *lex loci* (Eliza J. Ellis, 12 P. D., 159), and while no moral turpitude can attach to this claimant, yet she can not be accorded a pensionable status as the widow of the soldier for the plain reason that the law of Kentucky denies her status as the widow of her alleged husband prior to 1892. It is quite probable that these parties acted according to their best knowledge and conscience, but the maxim "Ignorance of the law is no excuse" has too stable a foundation to be overturned in this day.

The Department declines to dismiss this appeal, but instead sustains the rejection of April 10, 1900.

Action affirmed.

SERVICE-DISCHARGE-DESERPTION-JOINT RESOLUTION JULY 1, 1902.

FANNIE CUCHFIL (WIDOW).

The rejection of the claim for widow's pension under the third section of the act of June 27, 1890, upon the ground that "soldier was not honorably discharged from all rebellion service" being no longer tenable under the Joint Resolution of Congress, approved July 1, 1902, said claim is hereby remanded for reopening and readjudication under the provisions of said Joint Resolution, and so much of the present appeal as relates to said action of rejection is hereby dismissed.

It appearing that the disabilities from which it is alleged the soldier died, and upon which the widow's claim under section 4702, R. S., is based, were contracted by the soldier while absent from his proper command without leave, and in violation of his first contract of enlistment, and not in line of military duty, this appellant has no title to pension as the widow of the soldier under the provisions of said section. See cases of John Norton (9 P. D., 382); widow of John Sullivan (10 P. D., 55); Patrick H. Burns (11 P. D., 332 and 362); and Lewis Rankin (Ibid., 373).

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
August 11, 1902.*

Fannie Cuchfil filed in the Pension Bureau on September 25, 1901, an application for pension under the provisions of the third section of the act of June 27, 1890, as widow of Henry Cuchfil, alias Critchfield, late a private in Company K, Thirty-second Illinois Volunteer Infantry, and Company I, Sixth Indiana Volunteer Cavalry, alleging the death of said soldier on September 10, 1901, leaving her as his lawful widow surviving, without other means of support than her daily labor.

On February 8, 1902, said Fannie Cuchfil also filed an application

for pension as the widow of said soldier under the provisions of section 4702, Revised Statutes, alleging his death, upon the date aforesaid, from disease contracted in line of duty during his military service, and on account of which he had been pensioned under the provisions of the general law.

Both of said claims for widow's pension were rejected on March 14, 1902:

The claim under the third section of the act of June 27, 1890, upon the ground that the soldier had not been honorably discharged from all of his military service during the war of the rebellion.

The claim under section 4702, R. S., upon the ground that the diseases from which it is alleged the soldier died had been contracted by him while he was in desertion from a prior service and absent from his proper command without leave, and not in line of military duty.

From the rejection of both claims, as aforesaid, the present appeal was taken on March 31, 1902.

Since the rejection of the above-mentioned claim for widow's pension under the third section of the act of June 27, 1890, a joint resolution has been passed by Congress and approved July 1, 1902, which has a direct and material bearing upon said action.

Said joint resolution is entitled:

Joint resolution construing the act approved June 27, 1890, entitled "An act granting pensions to soldiers and sailors who are incapacitated for the performance of manual labor, and providing for pensions to widows, minor children, and dependent parents, and for other purposes."

The legislation directly applicable to and affecting said action of rejection is contained in the second section of said joint resolution, and is as follows:

That in the administration of the pension laws any enlisted man of the Army, including regulars, volunteers, and militia, or any appointed or enlisted man of the Navy or Marine Corps, who was honorably discharged from the last contract of service entered into by him during the late war of the rebellion, shall be held and considered to have been honorably discharged from all similar contracts of service previously entered into by him with the United States during said war: *Provided*, That such enlisted or appointed man served not less than six months under said last enlistment or appointment, and that his entire service under said last enlistment or appointment was faithful, and that he did not receive by reason of said last enlistment or appointment any bounty or gratuity other than from the United States in excess of that to which he would have been entitled if he had continued to serve faithfully until honorably discharged under any contract of service previously entered into by him, either in the Army, Navy, or Marine Corps, during the war of the rebellion.

It is obvious that under the provisions of this section of said joint resolution the action rejecting appellant's application for pension under the act of June 27, 1890, upon the ground stated, is no longer tenable, and therefore said claim is hereby remanded with directions that the same be reopened, reconsidered, and readjudicated under the

provisions of said joint resolution, and such action taken therein as the facts and evidence in the case may warrant.

So much of the present appeal as relates to the claim under the act of June 27, 1890, is hereby dismissed, and should the action to be taken in the claim, as above directed, be again adverse, another appeal therefrom may be taken, should the appellant desire so to do.

The rejection of appellant's claim for widow's pension under section 4702, Revised Statutes, stands upon an entirely different basis. This claim was not rejected for the reason that the soldier did not have an honorable discharge from all his terms of military service during the war of the rebellion, or because he did not have an honorable discharge from any particular term of service, but for the reason that the disability from which it is alleged he died had not been contracted in line of military duty. The question of his discharge from the service, or from any particular term of service, or the character of such discharge, did not enter into the case at all and was not material thereto. Consequently, the provisions of the joint resolution, above set forth, are not applicable to, and have no direct bearing upon, the action taken in this claim.

Under the provisions of section 4702, Revised Statutes, the widow of a soldier is granted a pension only in case of his death from some cause on account of which he would himself have been entitled to an invalid pension under the general law. In other words, the cause of the soldier's death must be shown to have been incurred or contracted in line of duty during his military service, to entitle his widow to pension under said section.

In this case the deceased soldier had been allowed an invalid pension, under the general law, for disease of gums, legs, and arms, results of scurvy; and it is alleged by the appellant that his death was caused by these disabilities for which he had been pensioned, her claim being based solely upon this theory.

The official records of the War Department show that the soldier had two terms of military service during the war of the rebellion. He first enlisted on January 1, 1862, in Company K, Thirty-second Illinois Volunteer Infantry, for a term of three years, and served therein until September 5, 1862, when he deserted while on duty at Boliver, Tenn., and never returned to said command. He enlisted a second time, while in desertion from his former command, on April 24, 1863, in Company I, Sixth Indiana Volunteer Cavalry, for a term of three years, and served therein, and in Company G, of the same regiment (to which transferred), until September 15, 1865, when he was mustered out and discharged the service with his company.

The soldier alleged and proved in his invalid claim for pension that he had contracted the disabilities for which pension was allowed him during the year 1864, while serving in Company I, Sixth Indiana

Volunteer Cavalry. His first contract of enlistment for service in Company K, Thirty-second Illinois Volunteer Infantry, did not expire by limitation until January, 1865. At the time, then, when he contracted said disabilities he was in desertion, was absent from his proper command without leave and in violation of his first contract of enlistment, and, manifestly, was not in line of military duty. Consequently, said disabilities, not having been contracted in line of duty, were not pensionable under the provisions of the general law, and it was error to have allowed the soldier a pension on account thereof, as was done. Since this appellant would only be entitled to pension as the widow of the soldier under the provisions of section 4702, Revised Statutes, by reason of his death from causes incurred or contracted in line of military duty, it follows that the death of the soldier from the disabilities for which he was pensioned, as alleged by her, would confer no title to pension upon her under said section.

See decisions of this Department in the cases of John Norton (9 P. D., 382); widow of John Sullivan (10 P. D., 55); Patrick H. Burns (11 P. D., 332, 362); and Lewis Rankin (*ibid.*, 373).

The rejection of appellant's claim for widow's pension under section 4702, Revised Statutes, upon the grounds stated was, therefore, without error, and said action is affirmed accordingly.

PATHOLOGICAL SEQUENCE—ARTERIOSCLEROSIS AND CHRONIC
DIARRHEA.

HARVEY CLARK.

The claimant is now pensioned under the act of June 27, 1890. He was formerly pensioned under the general law for piles. His claim for renewal and for additional disability from chronic diarrhea was favorably adjudicated, but it stands rejected on the ground of "no benefit." He alleged that disease of eyes and disease of heart were results of chronic diarrhea. It is shown that he suffers from general arteriosclerosis, and that the affection of the eyes, first noticed in 1897, is due to retinal hemorrhages from this cause. Arteriosclerosis, is "a physiologic process of old age," mainly, and there is no recognized pathological relation between this affection and chronic diarrhea as alleged.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
August 11, 1902.*

The attorney in the case of Harvey Clark, late a wagoner of Company A, Ninth Michigan Volunteer Cavalry, has appealed to the Department from the action taken in January, 1901, whereby the claim for renewal and increase of pension under the general law stands rejected. Said action was, in fact as well as in effect, merely a repetition of the action taken in June, 1899. The present appeal is virtually a repetition of a part of the appeal from that prior action. The matters then in contention were discussed in the Department's decision dated December 23, 1899, wherein the former action was affirmed. The present

appeal was originally presented as a motion for reconsideration of that decision.

The pensioner is now receiving \$8 per month under the act of June 27, 1890, said rating having been allowed in 1892, from July 18, 1890, the date of filing the claim. He has never asked for an increase of this pension. He had previously, in 1882, filed a claim under the general law, and that claim was adjudicated in 1892, along with the other, when a rating of \$2 per month was allowed from the date of filing thereof to the date from which the higher rating was granted. That pension was allowed on account of disability from piles, which alone was alleged in the original application.

After receiving these allowances in 1892 the claimant promptly filed a declaration for renewal and increase of the pension under the general law, and he then alleged that he was also disabled by reason of chronic diarrhea. This claim was not adjudicated until June, 1899, when the additional rating for chronic diarrhea made the aggregate of \$8 per month allowable under the general law. As the claimant had already received this amount from an earlier date, the claim stood rejected on the ground of no benefit, as already shown, and the Department held that the rate was properly adjusted.

In 1897, while this claim was pending, it appears the claimant's vision became suddenly affected. In an affidavit filed March 2, 1898, he alleged that disease of eyes and also disease of the heart had resulted from chronic diarrhea. The testimony of three physicians was filed with the view of showing that these diseases were such results. This relation was denied in the action of the medical referee, however, and the Department sustained that action also in its former decision.

A number of additional affidavits from physicians were filed in connection with the later claim, but as already shown it was rejected on the same ground as the former.

In the present appeal, or motion for reconsideration, the attorney asserts as follows with reference to the former action, the decision in which it was affirmed, and the second rejection of the claim:

First, that the opinion of the medical referee was the basis on which the action of rejection was affirmed; that * * * had the Department ruled upon this case wholly uninfluenced by the opinion of the medical referee, by whose action the case was formerly rejected, it is believed that the action of the Bureau would not have been sustained. * * *

Second, * * * that your [the Department's] action was not in accordance with the facts in the case, as the evidence was not carefully considered by the Department, merely, as stated above, the opinion of the medical referee being quoted.

Third [with special reference to the additional testimony], * * * that there is no just reason why the opinions of the nine physicians who have testified in this case should not prevail as against that of the medical referee, or so-called "expert," who never saw this claimant and knows nothing about him except from the affidavits of the physicians cited, which he has refused to accept. * * *

The assertion that the opinion of the medical referee was the basis on which the action of rejection was affirmed by the Department is both erroneous and unwarranted. The report of the medical referee was quoted in the decision because it contained a clear and concise history of the case together with a summary of the material evidence. In forming its conclusions, however, the Department was not governed nor influenced by the opinion of the medical referee, and its decision contains no statement or suggestion to that effect. The evidence was carefully considered by the Department, *ab initio*, without regard to the medical referee's report. After quoting this report it was stated that "the attorney did not familiarize himself with the facts in the case prior to filing the appeal." It would appear that he is again at fault—since the conclusions stated in said decision are misconceived, if not misrepresented, by him. Said conclusions are as follows:

Diarrhea does not appear to be the source of much disability, as shown by the claimant's statement to the board, quoted by the medical referee.

The rate allowed is deemed commensurate with the degree of disability resulting from chronic diarrhea and piles, and is \$2 in excess of that recommended by the examining board.

Disease of heart is not shown to exist, and any disturbance of function of that organ by indigestion is fully covered by the rate allowed.

To attribute a sudden hemorrhage into the eye, apoplexy of the retina, to chronic diarrhea does not appear to be warranted when the etiology of such affection is considered. The causes of sudden hemorrhage into the retina are generally violent, and operate either by causing a sudden flow of blood toward the head and eyes or in impeding its return. Chronic diarrhea would not thus operate.

The refusal of the Bureau to accept the theory advanced was undoubtedly proper.

After a careful consideration of all of the facts presented, no error is apparent in the adjudication of the claim under the general law, and the action is accordingly affirmed.

It is apparent that no part of these conclusions is based upon the opinion of the medical referee. They were formed "after a careful consideration of all of the facts presented," which includes the accepted etiology and pathology of the affections involved, and they are fully in accord with the facts. While the medical referee stated that "the conditions shown do not justify the acceptance of the disease of eyes as a result of the chronic diarrhea," the Department made the stronger statement that "chronic diarrhea would not thus operate;" also, that "the refusal of the Bureau to accept the theory advanced was undoubtedly proper."

Notwithstanding this positive adverse decision, a copy of which was sent to the claimant, it appears that the attorney promptly prepared a new declaration for increase of pension, which the claimant executed, asserting that he would endeavor to show by testimony of eminent physicians and specialists that diseases of the heart and eyes in this case are the pathological results of chronic diarrhea, as alleged. The affidavits of three physicians were filed along with this declaration

February 2, 1900, and those of six other physicians were filed July 21, 1900, three days after the claimant was examined by the official board of surgeons, although the affidavits had been executed at different dates in June and July.

This testimony and this official report establish one fact beyond all question which previously was barely suggested; that is, the claimant is suffering from general arteriosclerosis in a marked degree, and it is apparent that his impaired vision is due to the degenerative changes incident to that affection, causing hemorrhages into the retina and choroid. The question therefore arises, Was there a pathological relation between chronic diarrhea and general arteriosclerosis in this case? Although the question was not presented precisely in this form when the case was considered in 1899, the Department's conclusions were sufficiently comprehensive to cover the question even in its present form.

It appears, however, that the nine physicians whose testimony has been referred to have expressed opinions to the effect that the alleged affections of the eyes and heart are or may have been dependent upon malnutrition, malassimilation, auto-intoxication, or auto-infection (these terms being used carelessly and interchangeably) from chronic diarrhea. They do not "all agree that the disease of eyes is the result of chronic diarrhea," as asserted by the attorney. Their statements are for the most part qualified; and their opinions were evidently based upon erroneous views of the case. One of these affiants was a member of the board of surgeons that made the official examination in July, 1900, and it is possible, or probable, that the six affidavits were presented to the board before being filed in the Pension Bureau. The board stated in their report that—

In the absence of nephritic or rheumatic trouble we are of the opinion that the conditions found by the examination of the retina are due to toxemia due to digestive troubles already described and to chronic diarrhea.

What is the foundation of these opinions? The Department has consulted several standard authorities, but failed to find any which sustains the contention in this case. The only references contained in the nine affidavits are those given by Dr. E. A. Palmer, a former affiant in the case. He quotes from a writer in the Medical Record of February 3, 1900, who states that another physician had—

made an interesting suggestion * * * which may have a bearing on certain cases of retinal hemorrhage, in which the origin seems obscure, * * * that in rare instances a general arteriosclerosis has its beginning in a series of acute seizures of gastroenteritis, which leave behind them marked impairment of intestinal digestion.

He omitted from his quotation the next sentence, which materially qualifies the foregoing, as follows:

When this occurs in persons under twenty-five, there can be but little question that the gastroenteritis stands in a causal relation to the alterations in the vessels and similar changes in the kidneys.

Continuing Dr. Palmer's quotation, the aforesaid writer states:

Germane to this suggestion are the remarks of Mr. Marcus Gunn * * * in 1898. In speaking of general arterial disease he states: "In many of these cases the primary cause is probably a form of poisoning due to indigestion, a malassimilation and imperfect elimination producing disordered nutrition, and the blood vessels suffer in consequence.

Dr. Palmer also refers to Bouchard's work on auto-intoxication, translated by Oliver, wherein it is stated:

Chronic auto-intoxication, having as the point of its origin the digestive canal, is observed in chronic diarrhea, cancer of the stomach or of the intestine, and in chronic dyspepsia.

And he asserts he might quote volumes, gleaned from different eminent physicians' writings, showing that the deterioration of health from chronic diarrhea paves the way for many diseases, etc.

Such, in substance, is the result of the promised endeavor to show a pathological relation between chronic diarrhea and the arteriosclerosis which caused the defective vision. It is evident that the opinions in support of that view have no basis but mere speculation. The theory is not supported by facts, and it appears very improbable. Bouchard is one of the most authoritative writers on the subject of auto-intoxication, but he does not suggest the possibility of such a pathological relation between chronic diarrhea and arteriosclerosis. The whole subject of auto-intoxication from diseases or disorders of the digestive tract is obscure, and it rests largely upon analogy. There is but little definite knowledge of its true clinical features.

With reference to this subject the following statements appear in Stengel's Pathology, third edition (1900):

The causes of disease originating within the body itself are less definitely known, but it has been found in chemical studies that various products of normal metabolism when accumulated in abnormal quantity, or products of disturbed metabolism, may occasion local or widespread disease of various sorts. This self-poisoning is designated auto-intoxication.

The term auto-intoxication is frequently applied to products of intestinal putrefaction. This application of the term is not, strictly speaking, correct. The same poisons might have been produced by putrefaction of food outside the body, when the use of the name auto-intoxication would be manifestly absurd. If poisons are produced by imperfect digestion, and these affect the organism, the condition could properly be termed auto-intoxication.

This author states that "poisons produced in the intestines probably set in play the metabolic disturbances which terminate in overproduction of acids." This condition, known as acid intoxication, occurs in fever, cancer, diabetes, anæmia, advanced gastrointestinal disease, etc.; and the term auto-intoxication is doubtless frequently applied thereto. He also states that "it is probable that toxic substances produced in the stomach contribute to the metabolic disturbances, but this remains to be proved." Other authorities are equally conservative

on this topic. Evidently, therefore, it also remains to be proved that such metabolic disturbances may cause arteriosclerosis, as alleged. As just stated, the theory is very improbable, and there is no recognized authority to sustain the contention that chronic diarrhea caused the arteriosclerosis in this case. For this reason the Department can not accept the mere opinions of these physicians to controvert its former adverse decision. It is immaterial whether nine or ninety physicians expressed these opinions as long as they are not sustained by the recognized authorities.

As has sometimes been pointed out in similar cases where some unrecognized pathological relation has been alleged, the files of the Pension Bureau would afford abundant proofs of such relation, if it exists, for probably the majority of invalid pensions have been granted on account of chronic diarrhea; but it is safe to say that arteriosclerosis is even less frequent in this class than in some other classes of pensioners. This appears to be in accord with the observations of the writer in the Medical Record already referred to, who states that retinal hemorrhages are frequent in pernicious anemia, but "rarely occur in the cachectic conditions resembling anemia," for the conditions resulting from severe chronic diarrhea may be included in this category. Moreover, the alleged severity of chronic diarrhea in this case appears to have been an afterthought. As stated in the former decision, chronic diarrhea does not appear to have been the source of much disability, and it was not alleged as disabling until 1892, after the original claim was adjudicated.

In an affidavit filed in 1890 Dr. Palmer gave an account of his treatment of the claimant from about 1876, at different times, for piles, renal colic, and severe pain in the lumbar and sacral regions. He also stated that the urine contained an excess of uric acid and urates, etc.; he described the existing condition of the rectum and "tenderness over the colon with thickening of the lower half of the descending colon." He said that in his opinion the claimant had been disabled one-half "by reason of piles and results of them." He made no reference whatever to chronic diarrhea in that affidavit. No evidence of chronic diarrhea, except piles, was alleged or shown at the time of the official examination in 1890, and Dr. Palmer was a member of the examining board. In his affidavit filed in 1898, however, Dr. Palmer asserted that he had personal knowledge that the claimant had complained of chronic diarrhea and piles ever since 1866 and that he had prescribed for him on account thereof several times each year since 1876. These discrepancies can not be considered as immaterial. Dr. Palmer has been an attesting witness in the case at different times and he has furnished these affidavits apparently to meet the supposed requirements from time to time.

With reference to the etiology of arteriosclerosis, the following from Stengel's Pathology appears to represent the accepted teaching of to-day:

Arteriosclerosis is a physiologic process of old age, and probably begins as early as middle life in most persons. The earlier occurrence of the disease or the more extreme grades of its severity are dependent upon a variety of causes, among which certain chronic intoxications, viz, syphilis, gout, chronic alcoholism, and chronic nephritis, are prominent. An important cause is muscular exertion, and it is not uncommon to find marked instances in persons whose life or occupation has subjected them to unusual muscular strain. Cachectic conditions of various kinds may play a part, as in cases of carcinoma, tuberculosis, or inanition; and sometimes the chronic arterial disease follows after acute infections such as rheumatism, scarlet fever, typhoid fever, and the like.

This claimant was about 53 years of age at the time the retinal hemorrhages first directed attention to these conditions. It is an acknowledged medical maxim that "A man is as old as his arteries," and it is well known that some men age more rapidly than others; that one man may be as senile at 35, for example, as another at 70. The reasons for this are unknown to a great extent; but, as already shown, there is no authority for the assumption that in this case the arteriosclerosis resulted from chronic diarrhea.

It is apparent that the most usual cause of arteriosclerosis was wholly ignored by the board as well as by the several physicians whose affidavits are on file. Some of these physicians describe the condition of the interior of the eyes as very similar to that observed in chronic Bright's disease and diabetes, but it is asserted that neither albumin nor sugar was found by the recent examinations of the urine. This is not improbable, although chronic disease of kidneys is usually associated with arteriosclerosis, for the process may not have invaded the kidneys to a considerable extent or it may have been quiescent in those organs. The report of the examination in 1898 is ambiguous, but it appears probable that albumin or sugar was found in the urine at that time. It is not certain that these and other possible factors can be wholly eliminated.

There is no ground for taking exception to the last action of the Bureau, and the same is hereby affirmed.

DEATH CAUSE—INSANITY—EVIDENCE.

ELIZABETH PENMAN, NOW FULMER (AS WIDOW).

Claimant's husband's death by suicide, by reason of his insanity first appearing after his enlistment, is deemed to have been contracted in the line of duty, no other cause for his mental derangement appearing from the evidence.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 10, 1902.*

The appellant in this case is Elizabeth Fulmer (formerly Penman), widow of Abraham Penman, late of Company F, Twelfth Pennsylv-

vania Reserve Volunteer Infantry. Her application (No. 390015) for a widow's pension, filed March 7, 1889, alleged that her husband's death by suicide was the result of insanity contracted in the service in the line of duty. This application was rejected November 8, 1898, on the ground that claimant, although aided by a special examination, has failed to show that the soldier's insanity resulted from causes to which he was subjected in the service and in line of duty, citing the case of Margaret A. Berry (7 P. D., o. s., 164). Twice subsequently claimant endeavored to have her case reopened, with adverse results in both instances. Finally, on June 7, 1900, her appeal was entered.

Claimant was married to her husband October 13, 1850, and lived with him until his enlistment, August 10, 1861. About two months later, without any apparent cause (i. e., no accident or injury to head or spinal cord), the soldier began to manifest signs of mental derangement. On December 16, 1861, the records of the Adjutant-General show that he was admitted to the Government Asylum for the Insane of the Army and Navy, near Washington, and discharged from the service, apparently recovered, on February 27, 1862. The soldier went home, and the evidence shows that he was insane by spells from time of his arrival until August 20, 1862, when in an insane mood he ended his life by shooting himself.

On August 27, 1870, the claimant remarried. Her second husband died in 1887.

Watson Muse was the soldier's intimate friend and tent mate. He was not one of the original affiants in the case. In fact, he was not asked to testify until the special examiner took his deposition, September 5, 1898. He was not on the list of witnesses furnished by the claimant. He is described by the examiner as a "highly respected old man, thoroughly reliable and still strong mentally." The examiner continues:

He was associated with the deceased soldier in the coal business up to the time of enlistment and enlisted with him. Had known him since boyhood and lived a close neighbor.

The testimony of this witness is spontaneous, and the story of the soldier's army life is best told by him:

The first winter we were out he began to show signs of insanity. I slept with him, and he would have nothing to do with anybody else. He would get down and whisper in my ear that someone was hanging around our tent—he was all the time suspicious—and he got so bad he had to be examined. They concluded to send him to the insane asylum, and I myself took him * * * to the asylum * * * . I think it was in December, 1861.

Q. When did you first notice signs of insanity?

A. I think it must have been some six weeks or two months before he was taken to the asylum * * * .

Q. Had you noticed any signs of a disordered mind before enlistment?

A. Never saw no signs of it at all. There was no man more surprised than I was that he went that way after we got out. He had always been a level-headed young

man before he enlisted, so far as I could see * * * . I do not recollect that he had any peculiarities or oddities. I never saw anything in him odd from the general run of people.

Q. At the time did you form any idea as to the cause of his insanity?

A. Well, the only thing I recollect is that he mistrusted his wife some. He used to talk some to me about that. He had an idea that she was unfaithful to him—that's all that I think bothered his mind at all. I knew his wife well, and at that time I thought there was nothing wrong with her, but after he died I don't think she turned out as well as she ought, but of my own knowledge I know nothing. * * * I have never been asked to make an affidavit in this claim—have never heard from the claimant or any of them. No, sir, there is no question but what Abraham Penman's insanity first came on him in the service.

There is no question raised in this case as to the cause of soldier's death. He shot himself while insane, and he was insane while in the army. The question is whether melancholic dementia, for that it seems to have been, was contracted in the service in the line of duty. There is no record of disease or injury in the service. The only illness that the soldier ever had, so far as the evidence shows, was typhoid fever in the early part of 1853. The evidence shows that he entirely recovered therefrom; and it is pathologically impossible to connect his mental affliction with that fever. Where typhoid fever is responsible for insanity the mental derangement is not only immediately apparent as a sequence, but is continuous.

The claimant testifies that their married life was happy and the weight of the evidence sustains her. One witness, a woman, deposed that they did not get along well, and that he was jealous of his wife before the war, and that perhaps he had reason to do so, and that one Harriet Menham could tell all about her and about him. But Harriet Menham says they never had any trouble at all. Beyond the above imputation there is not a word of evidence that claimant's character or reputation was bad while the soldier lived. On the contrary, the many witnesses who refer to that aspect of the case, aver that her reputation was good. The dead soldier's own sisters vouch for her reputation then. One says, "Her character was good as long as he was alive;" the other one says: "Her character was not questioned at that time."

Of the fourteen witnesses who knew the soldier before the war, and who gave their depositions before the special examiner, eleven testify that he was mentally sound—neighbors, intimate acquaintances, fellow-laborers, relations. None knew of any injury or predisposition to insanity or family history of insanity that might account for or explain the soldier's insanity. There are but three adverse witnesses. One is Daisy Malone, the only witness who attacked claimant's reputation while her husband was alive. She says that he acted queer for about a year before he enlisted; should have been sent to an asylum. She is flatly contradicted by the other witnesses. Frank Cornell, a retired coal merchant, knew him intimately from 1850, and declares that he was

mentally sound. "Had he shown any signs of insanity," he says, "or had there been any neighborhood rumors to the effect that he had shown signs of mental aberration, I believe I would have known it." This witness has no possible interest in the case; in fact, he lives in another town and county.

Emanuel Nebb prefaces his testimony with the statement that he had a slight acquaintance with the soldier and thought for from four or five years previous to enlistment that he was eccentric and peculiar; he was unsociable, and it was rumored among his neighbors that he was a "little off" (his neighbors, on the contrary, declare him to have been sound). But the witness adds:

I can't say that I ever saw any indication of insanity previous to the war beyond his quiet manner.

Another witness, Thomas D. Pedan, not an intimate acquaintance, attended a dance at soldier's house, about a year before the war, and he says that soldier did not appear to take much interest in the dance. With the exception of this fact, and the fact that he was not prone to speak unless spoken to, witness could not say that he ever saw any evidence of insanity previous to enlistment.

This testimony goes a very little way in contradicting the evidence of the other eleven witnesses who knew claimant intimately. The fact that a man manifests no particular joy in a dance, or that he is not talkative, is not evidence that he is insane.

The evidence shows that the soldier was an industrious, hard-working, intelligent man, who read a good deal and was superior to the average man of his station in life. He was quiet in his disposition and devoted to his home.

After enlistment all changed. One witness thinks that he was mentally unsound when he enlisted; but of the many comrades who testify it is generally agreed that his symptoms of insanity commenced to develop a few weeks or about two months after enlistment. He was sullen, gloomy, despondent, and kept by himself. Then he began to have hallucinations. He accused one comrade of corresponding with his wife—a man who did not know her. He got another witness to "steal" the letter of another comrade, who was receiving letters from his wife, as he thought—a delusion. He heard his wife's voice about his tent. He was sure that his wife was concealed in the captain's quarters. His wife was ever on his mind and was the constant theme of his conversation. It was rumored about camp that he was jealous of his wife; that he had received information affecting her character. Of course, this is mere supposition, a natural consequence of his actions and his constant crazed conversation about his wife. Whether it was rumors affecting her fidelity that affected his mind or his insane mind itself that created the impression that he had heard such rumors, is an idle speculation. Assume that it was the former.

If the gossip impeaching his wife's good name was without just foundation it can not affect her status as claimant. The evidence is overwhelmingly favorable to her reputation at that time. It does appear that later, in October, 1866, she gave birth to an illegitimate child. This is her only lapse in virtue so far as the evidence shows. Before and since that time no one impeaches her chastity. On the contrary, witnesses distinctly affirm that her reputation is and has been good, barring that one lapse. The special examiner reports that he was unable to find that she has violated the act of August 7, 1882.

To reject this claim it must either be shown that soldier was insane before he enlisted—and the weight of the evidence is against that conclusion—or that the wife herself was responsible for his insanity and is estopped from claiming any benefit from the result of her misconduct. But while her conduct four years after her husband's death may deprive her of some sympathy, it can not be maintained that it proves that she was a bad woman five years prior to that time. It appears that a man named Jenkins was "keeping her company" for about two years. The illegitimate child was the result. There is nothing to show that she was wanton. In the absence of evidence to the contrary the elementary rule of charity should apply. A woman who is eligible for marriage or remarriage may allow greater liberties than she would if married. It would appear in this case that the claimant bore a good reputation during both the periods of her life as the wife of a man.

To deny the claimant a pension in this case will be substantially to hold that she was a faithless wife. It would perpetrate too great a wrong to impugn a wife's honor on such slight evidence as a woman's slur (Daisy Malone's remark, "He accused his wife of unfaithfulness before the war, and perhaps he had reason to do so") when the other witnesses, including two sisters of the soldier, defended her reputation and honor as the wife of Abraham Penman.

In the stated ground for rejection reference was made to the case of Margaret A. Berry (7 P. D., o. s., 164). The facts in the case are entirely unlike the facts shown by the evidence in this case. In the former case the soldier was found dead beside his tent, his gun near him. The cause of his death was assumed to be suicide by reason of insanity. It was shown, however, that the soldier, a noncommissioned officer, had been reduced to the ranks for drunkenness and general worthlessness. It was laid down as a dictum in that case that—

Where the claim of a widow is based upon the allegation that the soldier was insane when he committed suicide, while in the service, it is not sufficient to show that the soldier was insane, but it must be made to appear that his insanity resulted from causes to which he was subjected in the line of duty.

But who can say whence or by what process or for what reason the human mind becomes deranged in every instance?

The case of Bernard Bruner (8 P. D., 228) is more pertinent to this case than the one above cited. In that case it appeared that claimant had some susceptibility to mental alienation prior to enlistment, but the disease did not develop until after enlistment. Bruner enlisted August 22, 1862. Witnesses testify that he was somewhat peculiar and not talkative, quiet and reserved, but industrious and capable of performing his duties. In November or December he commenced to act wild or crazy and was sent to a hospital and was subsequently discharged. No reason for this change in his mental condition was shown. The decision rendered in that case says, in part:

It is apparent from the foregoing that a marked change in the soldier took place during his military service. While regarded as somewhat "peculiar" prior to that time, he had, so far as can be ascertained, never exhibited any decided symptoms of lunacy. * * * From some cause connected with the service—privation, exposure, fear, the exact cause can never be determined—his reason gave way, and he has since been an imbecile, unable to earn a support or transact the ordinary business affairs of life.

Admitting that there was a predisposition to insanity, and that the cause or causes which sufficed to destroy his mind would not have affected a stronger intellect, that fact can not be pleaded as a justification for denying him a pension. It is a well-settled rule of practice in the adjudication of pension claims that an unusual susceptibility to some form of disease, existing before enlistment, is no bar to pension if the disease did not develop until after claimant's admission to the service. The rule is essentially just. The Government took this man apparently sound and returned him to civil life manifestly unsound.

And so it was in the case of Abraham Penman. He was admitted as sound and discharged a mental wreck. From some cause or causes, it may have been melancholia produced by mere homesickness (and the evidence strongly suggests that explanation)—but no one knows or ever will know absolutely—his mind became deranged and his death resulted therefrom. There is no evidence to disturb the presumption that the disease originating in the service was contracted in the line of duty or from some cause or causes incident to army life.

The action appealed from is reversed and the papers are returned for action in accordance with this opinion.

LINE OF DUTY—INCURRENCE—UNDERGOING PUNISHMENT.

JOHN J. MACENTEE.

The claimant being at time of incurrence of injuries in confinement undergoing sentence of a court-martial, he was not in line of duty for pensionable purposes.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
August 11, 1902.*

This appellant, John J. Macentee, was a member of Company F, Forty-first United States Infantry, from October 19, 1899, to June 30,

1901, and on July 12, 1901, filed a claim, No. 1271748, for pension on account of amputation of right leg, due to injuries incurred while driving a team.

This claim was rejected in May, 1902, on the ground that the claimant was not in line of duty at time of incurrence of said injuries, being then serving sentence of a general court-martial; and on June 23, 1902, he appealed, contending that he was in line of duty, as he was at this time actually obeying the direct order of his superior officer.

In view of appellant's stated necessitous circumstances his appeal is considered as special.

The records of the War Department show appellant was court-martialed for drunkenness on guard and resisting and disobeying a sentinel, and on August 9, 1900, was sentenced to confinement at hard labor for six months and forfeiture of \$10 per month pay; during the term of which confinement he was, on December 9, 1900, directed by the commander of the prison at San Isidro, Luzon, P. I., where he was confined, to drive a prison team, which ran away, throwing him out of the wagon, and thus producing the injuries which resulted in amputation of the right leg on January 21, 1901. The various entries on the military and medical records contain the statement that these injuries were incurred "in line of duty."

This statement, however, is misleading and, for pensionable purposes, is not binding upon this Department in this claim. It signifies merely that the injuries were incurred while appellant was in line of his duty as a prisoner, and not that he was in line of duty as a soldier. By the sentence of the court-martial he was relieved for the time from all duty as a soldier, and whatever duty he might be called on to perform thereafter during the term of his confinement was that of any prisoner, whether civil or military; and whether the "hard labor," to which he was sentenced and which he might be called upon by his jailer to perform, was, in its nature, purely military or was wholly nonmilitary, he was no longer in the line of his duty as a soldier, and can have no right which springs from and rests essentially in the duty to which a soldier as such is bound, which is the duty upon which title to pension under section 4693 of the Revised Statutes rests.

The decisions of the Department holding that a soldier while in confinement serving sentence of a court-martial is not in line of duty for pensionable purposes are numerous. See Digest of 1897 (pp. 324-326); Sarah J. Hawkins (10 P. D., 370.)

The action appealed from is therefore affirmed.

SERVICE—ACT JUNE 27, 1890—DISCHARGE.

EDGAR G. SMITH.

Claimant was drafted on October 8, 1864, and rejected on December 12 next thereafter. He was furloughed to await discharge on December 19, 1864, and finally discharged on April 4, 1865. The certificate was afterwards amended so as to take effect from December 19, 1864, by reason of his being a rejected recruit. He was never assigned to any organization or placed on military duty. *Held:* That under these facts he is not pensionable under the act of June 27, 1890, not having served for ninety days or more in the military or naval service of the United States.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
August 11, 1902.*

On April 17, 1880, Edgar G. Smith, formerly an unassigned drafted man, Illinois Infantry, filed a declaration for pension under the provisions of the general law, alleging the existence of a disability resulting from rheumatism and piles, contracted at Camp Butler, Ill., in the month of October, 1864. His claim was rejected on November 30, 1885, on the ground of his admission that neither of the alleged sources of disability made its appearance until after the termination of his military service. He subsequently filed additional evidence in support of an application to reopen his claim, which evidence was considered on June 22, 1899, and held to be insufficient to warrant any change of action.

On July 12, 1890, the claimant filed a declaration under the provisions of the act of June 27, 1890, alleging the existence of piles, rheumatism, a broken arm, and general debility as sources of a pensionable disability. This claim was considered and rejected on May 19, 1892, on the ground that he was not in the military service of the United States for the period of ninety days.

A joint appeal was filed on October 27, 1899, in which it is contended that he was paid for service as an enlisted man from October 8, 1864, to April 4, 1865. It is also contended that he is entitled to pension under the act of June 27, 1890, in accordance with the ruling made in the case of David H. Dyer (9 P. D., 87).

As to the general law claim it is contended that the evidence of William J. Miller, a nurse in the hospital in which claimant received medical treatment, shows that the alleged diseases were incurred during service.

In an affidavit filed on April 1, 1881, the claimant states that he felt an uneasy sensation while in the service which indicated the existence of piles, but that no bleeding appeared until he had been home a month or two after discharge; that the alleged rheumatism "began about the same way." In another affidavit, filed on May 23, 1884, he states in addition that he received no medical treatment during service for either piles or rheumatism.

The affidavit of William J. Miller was filed on January 21, 1893. The witness states that he was a nurse in the hospital located at Camp Butler, in the latter part of the year 1864 and in the early part of the year 1865; that claimant was brought to that institution suffering from piles and rheumatism. He describes no objective symptoms, nor does he mention any fact tending to show the extent of his personal knowledge of claimant's condition at that time. The evidence, when considered in the light of claimant's adverse statements, is manifestly insufficient to establish the service origin of alleged disabilities.

As bearing upon the claim under the act of June 27, 1890, the records of the War Department show that the claimant was discharged on April 4, 1865, under a certificate of disability which declares that he was unable to perform the duties of a soldier by reason of the "atrophy of one testicle, feeble constitution, defective nutrition, contracted prior to enlistment."

A report from the office of the Adjutant-General, dated February 16, 1880, states that the above-mentioned certificate of discharge has been amended so as to read, "Discharged at Camp Butler, Ill., April 4, 1865, to date December 16, 1864, by reason of being a rejected recruit."

A subsequent report from the office of the Adjutant-General, dated June 21, 1883, shows that claimant was drafted on October 8, 1864, and received at Camp Butler on November 2, thereafter; that he was rejected on December 12, 1864, and furloughed on the 19th day of that month and year to await discharge; that he was discharged on April 4, 1865, on a surgeon's certificate of disability, to date December 19, 1864, by reason of being a rejected recruit.

The material facts in the case of Dyer, cited in the appeal, are different from those in the case at bar. It does not appear that Dyer was ever furloughed to await discharge, or that he in any other way became aware of the fact that his status as a civilian had been restored, and that he was released from his contract of service until he was finally discharged. The claimant in this case was furloughed to await discharge on December 19, 1864, at which time he had not been in the military service of the United States for the period of ninety days. Under the rulings of the Department as set forth in the case of Nancy Rathton (9 P. D., 162) and William H. Veach (12 P. D., 273) the service rendered by this claimant is not pensionable under the act of June 27, 1890, inasmuch as he "was not assigned to any military organization nor to military duty." It will thus be observed that the decision in the Dyer case has been modified in the respect in which it materially bears upon this case.

Action affirmed.

MARRIAGE—LAWS OF TENNESSEE—AGE OF CONSENT.

MAHALA VILES (WIDOW).

1. Claimant, when she was about 15 years of age, was married to one Wyrick, who was about 18 years of age, by a justice of the peace in Tennessee, without having first procured a license. As the age of consent to marriage in said State was 14 years in males and 12 years in females said marriage was valid, and her marriage to soldier while said Wyrick was living and undivorced was void, notwithstanding said Wyrick had married another woman prior to claimant's said marriage.
2. Common-law marriages are legal in Tennessee.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
August 19, 1902.*

This appellant, Mahala Viles, on September 7, 1899, filed a claim. No 704904, for pension under the Revised Statutes, as widow of Richard Viles, who was a member of Company K, Thirteenth Tennessee Cavalry, from September 15, 1863, to September 5, 1865, and who died August 4, 1899.

Said claim was rejected in December, 1899, on the ground that at the date of her marriage to said soldier the claimant had a living and undivorced former husband, and such rejection was adhered to in June, 1901.

From this action she appealed June 29, 1901, contending that her first marriage was only a "youthful escapade," a mock marriage, and created therefore no bar to her marriage to the soldier.

The evidence in the case fails to sustain this contention. The marriage in 1864 to her first husband, Wesley Wyrick, appears to have been entirely legal and valid. As her parents opposed the match on account only, it appears, of their youth, he being about 17 or 18 years and she 15 or 16 years of age, they ran away and were duly married by a justice of the peace in Hawkins County, Tenn., but without having procured any license. They lived together for eleven days only, when—on account, it is stated, of his prospective conscription into the Confederate service—he left her and enlisted in the Union Army on May 11, 1864. On his discharge, July 12, 1865, he did not return to her, but on October 8, 1866, in the same county, married Happy Arnold, whom he deserted about 1876, and on June 2, 1877, in Ray County, Tenn., he married Margaret M. Thompson, with whom he lived until January 14, 1882, when he was accidentally killed. There was no divorce from either or any of his marriages.

This appellant, believing, she says, that after said Wyrick had remarried she had a right to remarry also, on December 26, 1866, also in Hawkins County, Tenn., married the soldier Viles, with whom she lived until his death, thirty-three years later, bearing him six children.

There is, as stated, no ground for believing appellant's first marriage was invalid. She says she supposed at the time that it was a

legal marriage. The lack of a license or of parents' consent could not, certainly, invalidate it, if it were otherwise valid (*Blackburn v. Crawfords*, 3 Wallace, 175; *Smith v. Rector*, 10 Humph., 57; *Warwick v. Cooper*, 5 Sneed, 659); and as both parties were then over the Tennessee age of consent (14 years in males and 12 in females, as at common law), the marriage was not invalid for nonage (*Warwick v. Cooper*, *supra*; *Smith v. Rector*, *supra*).

Such marriage, therefore, was valid; and as it still subsisted at the time of appellant's marriage to this soldier the latter marriage was invalid and wholly void (Code of Tennessee, sec. 3293; *Moore v. Moore*, 102 Tenn., 148). "In such case," it is stated in the case cited, "there is no ground for a presumption of marriage; the second or last relation is simply illicit and nothing more."

The only question herein, then, is whether there was a valid marriage between appellant and said Viles at any time after the death of said Wyrick in 1882. The evidence upon this point is exceedingly meager, but so far as appears, during the seventeen years intervening between the deaths of these two men, appellant and said Viles cohabited as husband and wife, and deported themselves in all respects and were universally recognized as such, the same as prior to said Wyrick's death and since her and said Viles's formal marriage in 1866, and, as stated, six children were born of such cohabitation by her and said Viles, one being under 16 years of age at his death.

A marriage in Tennessee which would be good at common law is, doubtless, good also in that State (*Andrews v. Page*, 3 Heisk., 667; *Meister v. Moore*, 96 U. S., 76).

In *Johnson v. Johnson* (1 Cold., 630) the court say:

It is a familiar doctrine that in all cases, except prosecutions for bigamy and actions for criminal conversation, a marriage may be presumed or be established by reputation after the lapse of many years (6 Yerg., 364; 4 Humph., 480).

And that court cited with approval the case of *Wilkinson v. Payne* (4 Term Rep., 468), an action on a note given in consideration of a marriage; also, *Phillips on Ev.*, vol. 2, p. 286. In the case there cited the trial court left to the jury to presume a subsequent legal marriage, which they did, and on appeal the appellate court upheld the verdict, stating—

Though the first marriage was defective, a subsequent one might have taken place; that the parties had cohabited together for a length of time and were treated by the defendant himself as man and wife, and these circumstances afforded a ground on which the jury might presume a subsequent marriage.

And the court in *Johnson v. Johnson*, after quoting these authorities, concluded that—

Upon the principle of these cases it would not be going too far, perhaps, to hold that, in a case like the present, after the lapse of more than twenty years, the presumption of a subsequent legal marriage ought to be regarded as conclusively presumed, not subject to be disproved—

the marriage in that case being one duly solemnized but without a license, a license, however, being procured immediately after the marriage and dated the same as the marriage; and the court held that such duly recorded license could not, after so many years, be impeached by one (the plaintiff in that action, suing her husband for property she claimed as hers) who had for so long recognized the marriage as valid. But assuming the marriage to have been void *ab initio*, the court expressed strongly the opinion that a valid marriage subsequently might well be presumed from the long subsequent marital cohabitation of the parties, citing the authorities named.

In *Rogers v. Lessees of Park et al.* (4 Humph., 480), an action of ejectment in which an issue of legitimacy arose, the court stated that direct proof of marriage "is not required in any case where the marriage is of as long standing as this (twenty years), but the same may be established by reputation," and held that in a civil action, especially when the question arises incidentally and not between persons claiming under conflicting rights of heirship, a marriage may be presumed from proof of paternity or established by reputation.

While doubtless there is a presumption of fact that a relation shown to be illicit at its inception continues of such character until a contrary character be proved, yet there is also a strong presumption of law that parties are innocent; and when the illicitness is due only to a technical legal impediment, the parties being in their intention innocent, continuance, on removal of such impediment, of cohabitation generally gives rise to a presumption of marriage, strengthening with the succeeding years. The law not only presumes innocence, but favors strongly marriage; and when the parties' original intent was matrimonial and their assumed marriage was honestly believed by them to be valid, and was maintained by them for many years after removal of any impediment to a valid marriage and until the death of one of them, the courts generally instruct strongly in favor of a valid marriage after removal of such impediment, and even, in order to sustain a *de facto* marriage, will presume removal, by death or divorce, of such impediment, particularly when the legitimacy of children is involved.

The question appears to be generally considered by the courts as one of fact for the jury, or the court acting as a jury, to determine from all the evidence. The fact that cohabitation was begun by the parties with full knowledge and understanding that it was illicit and adulterous in character would most certainly have a strong adverse bearing in fact on the question of subsequent marriage, as would the fact that cohabitation was commenced in the honest belief that it was truly matrimonial have a strong favorable bearing in fact on such question. In one case, doubtless, strong evidence of the subsequent marriage would be required, while in the other slight evidence only would be sufficient.

While ignorance of the law as to remarriage during the existence of a first marriage does not relieve the parties from either the civil or the penal consequences of the second marriage, and can not operate to validate it, however good and innocent the faith of the parties in remarrying be, yet when the impediment of the first marriage no longer exists the presumptions of innocence and in favor of marriage, and especially of the legitimacy of offspring, combine in influencing courts and juries to find a new and valid marriage subsequent to removal of such impediment. Such seems to be the prevailing doctrine of the courts in this country generally; and while no decision precisely in point has been found in the reported cases of the courts of Tennessee, it is seen, from the decisions of those courts cited herein, that in that State, as in most of the others, the presumptions of innocence in favor of marriage and in favor of legitimacy are given a strong and controlling effect in all civil actions, and that marriage will, as a rule, be inferred from long-continued cohabitation of a matrimonial character, without direct proof of a marriage in fact.

The act of Congress approved August 7, 1882, provides that—

Marriages, except such as are mentioned in section 4705 of the Revised Statutes, shall be proved in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued.

It is believed, therefore, under the laws of the State of Tennessee, that this appellant may establish herein a valid marriage to this soldier Viles by proving long-continued matrimonial cohabitation with him after the death of said Wyrick. As stated, however, the testimony as to such cohabitation by her and said Viles, or as to the bona fides of its commencement or continuance, is exceedingly meager, this claim being rejected principally upon her own testimony as to the fact of her marriage, merely, to said Wyrick given by her in the adjudication of a claim filed by the alleged widow of the latter by a subsequent marriage, and rejected in September, 1899, on the ground of his marriage to appellant.

This claim, therefore, should be further adjudicated as to the alleged matrimonial character of appellant's cohabitation with said Viles from its inception to its close, and particularly from the death of said Wyrick. The papers are returned herewith for such adjudication, on completion of which they should be retransmitted to this office, with your further report, for the final disposition of the appeal, and as the appeal is made special you will complete such adjudication at as early a date as is practicable.

DEPENDENT PARENTS—MEANS OF SUPPORT

ELIZABETH COVE (MOTHER).

The evidence fairly shows the claimant had adequate means of support aside from her own labor and the contributions of persons not legally bound for her support, at the date of filing her claim, she having at that date property worth \$5,000, mortgaged for \$2,100, and which appears to have been fairly rentable for at least \$30 a month over and above interest and taxes, besides furnishing her a house in which she lived and kept two boarders, sons, who paid her about \$55 a month.

Held, as a general rule, that a parent should be chargeable with such productive use of his or her property as it may reasonably and fairly be capable of as a means of support.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 19, 1902.

This appellant, Elizabeth Cove, on October 11, 1898, filed a claim, No. 684242, for pension as mother of Edward J. Cove, alleged to have served as James Cove in Company E, Twelfth United States Infantry, during the late war with Spain, and to have died September 30, 1898, while in said service.

Said claim was rejected in February, 1900, on the ground that she has a net income of over \$30 a month, and is not, therefore, dependent under the law.

In this appeal, filed March 31, 1900, it is contended that the evidence shows the claimant is dependent within the purview of the law as construed by the Department.

Appellant admits the possession of a three-tenement house, valued by her at \$3,300, but according to a son's testimony worth \$5,000. There is upon this property a mortgage of \$2,100, at 5 per cent interest. She lives in one tenement, and, at the time of filing this claim, rented each of the others at \$7 per month, and in November, 1899, the storeroom located on the first floor of the building was rented at \$35 a month, this being the first time, however, it is stated, since the soldier's death that this room has been rented. The taxes amount to over \$70 a year, making the total expenses incident to the building \$175 a year exclusive of insurance or repairs. One adult son has lived with claimant and paid her \$7.40 a week for his room and board. A minor son also paid her his wages, \$23 a month, while he was employed; but at the time of the special examination, in January, 1900, he was unemployed, and had then attained his majority. There is also a married daughter and another son who is manager of a coal company.

From the foregoing statement of facts it appears that this appellant's property was not, at the time of filing her claim for pension, paying the expenses of its maintenance, the interest on the mortgage and the taxes exceeding the rent received, so that, as she says, she then had therefrom merely a shelter, and the balance necessary to maintain the

property and secure her food and clothing was obtained by means, apparently, of her own labor in boarding her two sons, who together paid her about \$55 a month.

Under the express terms of the law, either section 4707 of the Revised Statutes, under which this claim appears to be filed, or section 1 of the act of June 27, 1890, a mother's "own manual labor" and the contributions of persons not legally bound for her support are excluded in determining her pensionable status. And section 10 of chapter 81 of the General Statutes of Massachusetts, in which State appellant and her children reside, provides that—

The kindred of such poor persons, in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, living in this Commonwealth, and of sufficient ability, shall be bound to support such poor persons in proportion to their respective abilities.

The "poor persons" here referred to being mentioned in section 1 of said chapter as follows: "Every city and town shall relieve and support all poor and indigent persons lawfully settled therein whenever they stand in need thereof," the succeeding sections up to said section 10 providing the legal machinery for carrying out the provisions of said section 1, and the sections following said section 10 providing the legal machinery for carrying out the provisions of that section.

Whether this appellant is such a "poor person" as to subject her children to a legal liability, under this statute of Massachusetts, to support her is doubtful; possessed as she is of property worth nearly or quite \$3,000 over and above incumbrances, and rentable, as a whole, for over \$30 a month above interest and taxes, besides furnishing her a home in which to live.

The money paid her by her two sons does not appear to have been paid by them under any legal liability of theirs for her support, but merely in return for their board, although she would, perhaps, have a legal right to the wages of her minor son. The fact, therefore, that her boarders are her own children is immaterial, as their payments can not, probably, under the facts shown as to her property, be considered as contributions of persons legally bound for her support, but merely as receipts from them as boarders. Were she in fact a poor person within the meaning of said State law, such payments by her children might be considered as contributions made by them under their statutory liability for her support, and *prima facie* evidence of their sufficient ability to support her, thus making her not pensionable, she being adequately supported thereby, as held in the case of *Hiram Collins* (12 P. D., 361). As stated, however, she does not appear to be in fact a poor person, under the laws of Massachusetts, and such payments to her by her children should properly be considered merely as ordinary receipts from keeping boarders.

The fact, also, that her own labor is involved in her securing her support by keeping boarders does not necessarily exclude such receipts from consideration herein, as the amount received by her from this source, about \$55 a month, appears to be entirely sufficient to relieve her from any necessity herself of laboring, the work being such as might well be hired, and yet leave her a margin of profit for her own support.

And she should, in reason, be charged also not only with the fair rental value of her property as a whole, but particularly with the rental value of such part of her property as she herself occupies as a home, for by so occupying it she is relieved from the cash expense of paying rent, and is thus, in part, supported.

In general, a person should be chargeable with a reasonably prudent management of his property, such management as a person of ordinary intelligence and business sense would use; and if his property is reasonably capable of producing for him an adequate support, he should be charged with that which it may thus produce, whether it be rents or interest, or foods, vegetables, grains, fruits, or whatever it may be convertible into for purposes of support.

Just why this appellant's storeroom was not rented during the ten years after the soldier's death is not clear. There is some inference that it may have been so out of repair as not to be rentable, as she says her property is generally in much need of repairs, for which, however, she has had no means, her receipt from rentals prior to November, 1899, being insufficient even to pay interest and taxes, and no higher or a second mortgage being possible. But as this room now rents for as much as \$35 a month, it is evidently not in such ill repair as to be untenable, and no reason appears why she should not be chargeable with its rental, at that or some less amount, in the past.

The vital question herein is whether appellant had, at filing of claim, an adequate means of support; and as she then had property of a net rental value of over \$30 a month, or which, if sold, would apparently yield her a net cash return of nearly or quite \$3,000, it appears she then had a very considerable and substantial means of support, and, it is believed, an adequate means of support within the meaning of the law. The action appealed from, therefore, is affirmed.

MARRIAGE AND DIVORCE—LAWS OF CHEROKEE NATION.

LUCINDA ROSS (WIDOW).

- . The Cherokee Nation, in the year 1859, passed an act prescribing the manner and method of obtaining divorces in said nation. In the year 1866 John Ross, sergeant, Company K, Third Indian Volunteer Home Guards, attempted to divorce his wife according to an old tribal custom, by sending her away from his home, and then took the claimant herein as his wife, the said act still being in force.

Held: The attempted divorce was futile, and the attempted marriage with claimant void ab initio.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 11, 1902.

Lucinda, as alleged widow of John Ross, formerly a sergeant in Company K, Third Indian Volunteer Home Guard, filed her application under the act of June 27, 1890, on September 5, 1890, and December 4, 1897, claim being rejected on June 29, 1900, on the ground that soldier, at the date of his marriage with claimant, had a living undivorced wife. An appeal was filed on July 9, 1900, in which the attorney contends that the divorce of soldier and his second wife and the marriage of soldier and claimant were according to tribal custom, were consequently valid and legal, and that section 4705, Revised Statutes, should govern.

It is admitted, wholly for the sake of argument, that the soldier's first wife and the claimant's first husband were dead, and that he attempted to divorce his second wife prior to his marriage with claimant in 1866 by sending said second wife back to her parents.

The records of the Indian Bureau, said bureau being within the jurisdiction of and a part of this Department, show that in the year 1833 the eastern and western tribes of the Cherokee Indians came together and united themselves under the name of the Cherokee Nation, and adopted a constitution for the government of said nation. No specific provision seems to have been made in said constitution regarding divorces, but it appears by the records of the Cherokee Nation, a copy of them being on file in the Indian Bureau in this Department, that long prior to the year 1859 divorces were granted by the council of the nation, they seeming to be in all respects equivalent to what is known as a legislative divorce. In the last-mentioned year the council regularly passed the following:

An act respecting divorce.

(1) *Be it enacted by the National Council,* That the several courts of this nation be, and they are hereby, authorized and required to grant divorces from the bonds of matrimony, and suits for that purpose, whether for a mere divorce or for divorce and damages, shall be brought in the same manner and conducted in the same manner as other suits at law.

* * * * *

(3) *Be it further enacted,* That divorces shall not be granted for any other cause than adultery or a wilful neglect of the married state by either husband or wife.

Approved:

JOHN ROSS.

TAHLEQUAH, C. N., November 5, 1859.

The second enactment, not quoted in the above, provides for jurisdiction in cases of divorces with or without damages, and has no bearing upon the issue in the case under discussion.

It will be observed that the Cherokee Nation, through its legislative body, in the year 1859 passed an act regulating the method of obtaining divorces in said nation, and thus, by legislative enactment, abolished the old custom of divorce prevalent in Indian tribes and substituted therefor the manner and method of civilized communities. This law was not repealed at the time soldier and claimant attempted to marry, no act of the Cherokee Nation has since 1859 made any retrograde steps in the matter, and it is plainly evident by the laws of said nation, hereinbefore referred to, that even before the year 1859 the tribal custom of divorce was virtually done away with in said nation and legislative divorce substituted therefor.

It is useless to argue, as does claimant's attorney, in the teeth of the law that the old custom of divorcement by sending a wife from the wigwam is still recognized in the Cherokee Nation. There is no evidence in this case to support such a statement, and even if such a statement be true it does not vary the law of the Cherokee Nation, and serves only to emphasize the fact that those parties who thus attempt to divorce themselves do so contrary to law.

It was demonstrated in the opinion in the case of Cassandra F. Clark (8 P. D., 235) that this Department would be bound, respecting domestic relations so far as an Indian nation is concerned, by laws of the particular tribe or nation under which the issue as to marriage or divorce arises. In said case a divorce was granted by the Wyandotte council, and although said divorce was not obtained in all particulars, the same as it might have been done in one of the States of the Union, yet said divorce having been granted according to the laws, customs, and usages of the Wyandotte people it was sustained. The same principle must obtain in the case at bar. When this claimant and soldier commenced to live together it is admitted that the soldier had a living wife, and said wife appears to be alive to-day. He evidently attempted to divorce her according to an old tribal custom, but said custom passed out of existence so far as any force it might have had was concerned long before the attempted marriage in 1866.

The Cherokee Nation has been a separate political community under its present constitution since the year 1833, and it is a matter of history as well as of record that even long before that date the Cherokees had done away with many of their tribal customs and usages, and the tribe had attained an eminent degree of civilization. It must be regarded as a political community and a body politic which has the right to make its own laws respecting its domestic relations (see the case of Clark, *supra*), and when it has made such laws, and they are shown in evidence, this Department will respect and uphold them, and will, further, hold any claimant who seeks a pensionable title as a Cherokee Indian amenable to and bound by the law of the Cherokee Nation.

So far as the contention in the appeal is concerned, to the effect that section 4705, Revised Statutes, must govern, reference is made to the opinion in the case of Eliza J. Ellis (12 P. D., 159). Said opinion demonstrates that the said section is not applicable to a claim filed by a widow of an Indian soldier under the act of June 27, 1890, but that, in such a case, the second section of the act of August 7, 1882, must obtain. This act, as is doubtless well known to appellant's attorney, makes the *lex loci* the criterion.

It is held that the marriage of the claimant and soldier was void ab initio for the reason that the soldier, when he entered into his marital relations with claimant, had a living wife from whom he had never been divorced, according to the laws of the Cherokee Nation, of which he and his wife were members.

Action affirmed.

DISABILITY—SPECIFIC—AMPUTATION—ACT AUGUST 4, 1886.

HENRY WHEELER.

The question as to whether there is total disability in a limb, as mentioned in the act of August 4, 1886, is one requiring evidence to establish and judgment to determine, and therefore such a disability is not a permanent specific disability within the meaning of section 4698½ of the Revised Statutes, and an increased rate of pension on account of such a nonspecific disability must commence from the date of the certificate of the medical examination had under a claim for increase instead of from the date of the passage of the act of August 4, 1886.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 13, 1902.

Henry Wheeler, formerly private, Company D, One hundred and twenty-fifth New York Volunteer Infantry, who is now drawing \$36 per month under the general law for disability due to amputation of right leg and resulting total disability of same, on April 16, 1901, filed a second motion for reconsideration of the action of the Bureau in commencing his pension at present rate from June 15, 1892, instead of from the passage of the act of August 4, 1886, providing for the \$36 rate for total disability in one leg. No new evidence has been filed in the claim since the last decision of this Department, dated January 15, 1898, and there has been no change in the law or practice. Under the rule the present motion might well be dismissed without further consideration, especially in view of the fact that the decision above referred to was exhaustive and set out fully the facts in the case and the law applicable thereto. However, as the claimant appears to believe himself wronged and files an earnest plea for reconsideration, his case will be again reviewed on its merits.

This claimant's right leg was amputated 4 inches below the knee

joint, and under the act of August 4, 1886, was granted \$30 per month, the rate therein provided for the loss of a foot or a leg below the knee.

On the 8th day of July, 1891, the claimant filed a claim for increase, alleging that he was entitled to \$45, because the stump of his leg was in such a condition that he could not wear an artificial limb. This claim was rejected, properly, on the ground that the point of amputation was not "at or near" the hip joint. However, upon consideration upon appeal in 1892 the Department ordered a medical examination. This examination was had June 15, 1892, and on the certificate thereof pension of \$36 per month was granted, to commence from its date, because of resulting total disability of leg from the amputation, as provided by the act of August 4, 1886.

It was contended, and is now contended, by the claimant that his pension of \$36 per month should have commenced from the date of the passage of the act. This is the sole issue raised by the appeal and the motion under consideration.

Section 4698½ of the Revised Statutes provides:

Except in cases of permanent specific disabilities, no increase shall be allowed to commence prior to the date of the examining surgeon's certificate establishing the same, made under the pending claim for increase. * * *

Resulting total disability of a leg, amputated 4 inches below the knee, is not the "permanent, specific disability" mentioned in the statute.

In the case of William H. Parker (8 P. D., 198), the Department held:

A permanent specific disability is one that is due to wounds, injuries, or disease contracted in the service and in line of duty, and which is unchanging, fixed, and permanent in character, and which when once established does not require subsequent medical examinations to determine its existence or continuance, and which disability is particularly enumerated or classified, and for which a fixed and definite rate of pension is named in the law.

See also case of Batchelor E. Bachman (7 P. D., 249).

In other words, this claimant has a permanent specific disability in the loss of his leg below the knee by amputation. The resulting total disability of the limb is a matter to be established by evidence, both as to existence and continuance, and it can not, therefore, be regarded as permanent and specific within the meaning of the law. When claim was filed in 1891, the Department ordered an examination under section 4698½ of the Revised Statutes, and dated the pension to commence from said medical examination showing the total disability in the leg claimed for.

It may be, as he contends, that claimant's leg was in the same condition in 1886 as it was shown to be in 1892, but under the law for the amputation he was entitled to but \$30 per month. If from the amputation total disability of the leg resulted, the only way in which he could secure the \$36 rate provided in the act of August 4, 1886, for such disability was by filing a claim for increase and submitting to a

medical examination, and if said examination showed total disability of the leg resulting from the amputation, he would be entitled to the \$36 rate from its date. In this case claim was filed in 1891 and an examination was had in 1892, and pension properly commenced from the last-named date.

Repeated motions for reconsideration on the same grounds, in the absence of new and material evidence, will not be considered by the Department, and care has been taken in this particular case in order that an apparently honest and earnest claimant may see that if he has been wronged the fault is not with the Bureau or this Department, but if fault there be, it is in the law, which has been carefully observed in his case.

The motion for reconsideration is overruled.

LIMITATION—MARRIAGE—ACT MARCH 3, 1899—WIDOWS.

HENRIETTA BRIGGS (WIDOW).

The only widow who is required by the fourth proviso of the act of March 3, 1899, to have lived and cohabited with her husband continuously from the date of their marriage to the date of his death, in order to establish her pensionable status, is one whose marriage occurred on or subsequent to the passage of the act and subsequent to his last military or naval service, he not having served in the war between the United States and the Kingdom of Spain. Claimant having married soldier June 17, 1899, and lived and cohabited with him continuously from the date of the marriage to the date of his death, January 3, 1900, the rejection of her claim on the ground that she married the soldier subsequent to the passage of said act was error.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 13, 1902.*

Henrietta Briggs, widow of Chester M. Briggs, late private Company I, First Michigan Cavalry, and pensioner under Certificate No. 207,317, appealed by her attorney January 15, 1901, from the Bureau action of March 30, 1900, rejecting her widow's claim, No. 711,398, filed January 15, 1900, on the ground of "no title, claimant having married the soldier subsequent to the passage of the act of March 3, 1899."

It is contended that as claimant lived and cohabited with said soldier continuously from the date of their marriage to the date of his death, she has a pensionable status under the expressed terms of the act of March 3, 1899.

The papers in the case were forwarded to this Department with the following Bureau report of August 15, 1902:

The meaning of the act of March 3, 1899, is not wholly free from obscurity, and it has not been definitely construed by the Department; for this reason the action in this case is adhered to. Because of its importance, this report has been marked "immediate."

The construction of the fourth proviso of the act of March 3, 1899, was first considered by this Department April 17, 1901, in the appeal of the minors of George Adams, deceased, Doc. No. 60,081 (claim No. 705,309).

It was contended in that appeal that as soldier's widow did not live with him for a long period of time prior to his death his minors were entitled to pension, as the widow had no pensionable status by reason of the fourth proviso of said act of March 3, 1899.

The minors' claim was rejected by the Bureau on the ground that "the soldier left a widow surviving who had a prior right to pension."

In reaching the foregoing conclusion in that case the Bureau evidently and, as the Department believes, correctly construed the word "or," in the eighth line of said fourth proviso, as a disjunctive conjunction.

The widow in that case was married to the soldier in 1890.

After quoting the proviso (30 Stat. L., 1380), it was held that:

A mere reference to such proviso shows that the question of continuous cohabitation of the claimant with the soldier only becomes material in the absence of proof of marriage "duly and legally contracted" prior to March 3, 1899. * * * The widow of a soldier has the prior right to pension, which right is not defeated by reason of her abandonment of soldier, where the marriage was duly and legally contracted prior to the act of March 3, 1899, or by her failure to care for soldier's minor children by a former wife.

The Bureau's action in that case, rejecting the minors' claim on the ground stated, was affirmed. (417 L. B., 202-4.)

A motion for reconsideration of said departmental decision was filed August 15, 1901, and duly considered by the Department September 23, 1901, when it was held that no reason appeared for reversing or in any manner modifying the former departmental decision. (443 L. B., 483-486.)

That part of the fourth proviso of said act directly bearing on this issue is as follows:

That hereafter no pension under any law of the United States shall be granted, allowed, or paid to the widow of a soldier, sailor, officer, naval or military, marine, marine officer, or any other male person entitled to a pension under any law of the United States, unless it shall be proved and established that the marriage of such widow to the soldier, sailor, officer, marine, or other person on account of whose service the pension is asked was duly and legally contracted and entered into prior to the passage of this act, or unless such wife shall have lived and cohabited with such soldier, sailor, officer, marine, marine officer, or other person continuously from the date of the marriage to the date of his death, or unless the marriage shall take place hereafter and prior to or during the military or naval service of the soldier, sailor, officer, marine, or other person on account of whose service the pension is asked or claimed.

The only widow who is required by said proviso to have lived and cohabited with her husband continuously from the date of their mar-

riage to the date of his death in order to establish her pensionable status is one whose marriage occurred on or subsequent to March 3, 1899, and subsequent to his last military or naval service, he not having served in the war between the United States and the Kingdom of Spain.

The evidence in this case shows the claimant was married to soldier June 17, 1899, and lived and cohabited with him continuously from the date of their said marriage to the date of his death, January 3, 1900.

In view of these facts the Department is of the opinion that the rejection of the claim on the ground that claimant married the soldier subsequent to the passage of the act of March 3, 1899, was error.

Said action appealed from is accordingly reversed.

MARRIAGE AND DIVORCE—LAWS OF ILLINOIS—IMPEDIMENT.

ELIZA B. WILSON (WIDOW).

In this case soldier married claimant while he had an undivorced wife living, of which claimant was ignorant. Three months after such marriage soldier procured a decree of divorce from his first wife, evidencing his desire to remove any impediment to such marriage.

Held: That these facts warrant a special examination to determine the facts as to when soldier filed his bill for divorce, the date of the default decree, and all facts bearing on the intention of the parties to live in the relation of husband and wife subsequent to the removal of the impediment to their legal marriage, distinguishing this case from that of Cartwright et al. v. McGown (121 Ill., 388).

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 16, 1902.*

In the above-entitled case the claimant filed a claim for pension under the act of June 27, 1890, July 29, 1897, which was rejected April 18, 1898, in the following stated language:

Approved for rejection on the ground that the claimant is not the legal widow of the soldier. The ceremony of marriage was performed October 11, 1888, while the soldier had a wife living from whom he had not been divorced until December 17, 1889 (1888). No marriage ceremony subsequent to date of said divorce. See opinion of the chief of the law division.

Appeal was taken to the Department from said action, and on January 17, 1900, the action was affirmed. A motion for reconsideration was filed, and on May 17, 1900, the motion was overruled. July 29, 1902, a second motion for reconsideration was filed by the attorneys for claimant, in which a long argument is made and numerous decisions of the Department referred to. Ordinarily repeated motions for reconsideration will not be entertained by the Department where no new evidence is filed, but in this case a careful review of the papers has been had on account of the apparent earnestness of counsel and their reference to the law of Illinois, where they reside.

The basis of the rejection of the claim was the following opinion of the chief of the law division of the Bureau:

Herewith are returned the papers in the above-mentioned claim. The case was sent to the law division for the purpose of an opinion as to the legal widowhood of the claimant.

It appears from the evidence that claimant was married to the soldier in Indiana, October 11, 1888; that at time of said marriage the soldier had a wife living and undivorced; that soldier obtained a divorce from said former wife in the circuit court of Cook County, Ill., December 17, 1888, some two months subsequent to his marriage to the claimant; that they lived and cohabited together as husband and wife from the date of their marriage up to the soldier's death, which occurred July 13, 1897—a period of eleven years—and one child was the issue of their marriage; that they were recognized as husband and wife by their neighbors and the community at large.

In view of these facts, the question is presented whether it is possible for claimant to prove a valid legal marriage with the soldier subsequent to the removal of the impediment by the divorce from former wife in Illinois in 1888.

The marriage of this claimant and the soldier in Indiana while the soldier had a wife living and undivorced was null and void; hence, in view of the fact that they maintained a matrimonial cohabitation in Illinois for some years preceding the soldier's decease, the legality of the marriage will be considered under the laws of Illinois, in accordance with the first clause of section 2 of the act of August 7, 1882.

In *Cartwright et al. v. McGown* (121 Ill., 388), the court held, among other things, that—

"The marriage of a man and woman, where one of them has a prior husband or wife who is then living and undivorced, is void and not merely voidable. Being a nullity, no decree is necessary to avoid the same.

"A void marriage is good for no legal purpose, and its invalidity may be shown in any court between any parties, either in the lifetime of the parties thereto or after their death.

"In case the marriage or cohabitation takes place while one of the parties has a husband or wife living or undivorced, it is considered void and illicit, not matrimonial, and no marriage can be presumed from such illicit cohabitation.

"Where the cohabitation was in its inception illicit, and presumption of the innocence and morality of the parties is at once rebutted and overcome, and without proof of a change in their relation to each other it will be presumed that the continuance of the connection of the parties is of the same character.

"The same presumption will continue after the removal of the impediment until new facts are presented that the illicit relation is changed to one matrimonial and a marriage has taken place between the parties."

In the case at bar it is clearly shown that the marriage of claimant and the soldier while the soldier had a wife living and undivorced was void and illegal in its inception, and though it appears that they continued cohabitation together as husband and wife from their marriage in 1888 up to the soldier's decease in 1897, yet there is nothing in the evidence showing that there was such a change in their relations subsequent to the removal of the impediment by the soldier's divorce from his former wife in 1888 as would warrant the presumption that their illicit relation was changed to one matrimonial and that a marriage had taken place between the parties. Therefore, in the light of the decision cited, and upon the evidence, I am of the opinion that a common-law marriage did not arise between claimant and the soldier.

This opinion was rendered, no doubt, without a careful consideration of the facts in the case decided by the Illinois court, in comparison with the facts in the case under consideration.

In *Cohen v. The State of Virginia* (6 Wheat., 264-399) Chief Justice Marshall said:

It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which they were used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

So in *Carroll v. Carroll* (16 How., 275-287) the Supreme Court, referring to the last cited case, said:

Therefore this court, and other courts organized under common law, has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties.

The Bureau rejected the claim under consideration on the holding of the Department in the case of *Mary B. McCollum* (6 P. D., 93), in which an Illinois marriage question was involved, and the Department sustained the rejection on the theory that the facts in this case were in point with those in the *Cartwright* case (121 Ill., 388) decided by the supreme court of Illinois.

The decision of the supreme court of Illinois in a case where the facts are the same as in a case before the Department is controlling under the act of August 7, 1882, in a pension claim where a marriage is brought in issue.

In the case of *Meister v. Moore* (96 U. S., 76) the Supreme Court said:

This court adopts, as an authoritative declaration of the law of Michigan, the ruling of the supreme court of that State in *Hutchins v. Kimmel* (31 Mich., 126) that, notwithstanding the statutory regulations have not been complied with, a marriage contracted there *per verba de præsenti* is valid.

In *Stewart on Marriage and Divorce*, par. 215, the following is found:

Marriage is not a national matter, but it is a domestic relation within the control of the several States.

In *Strader v. Graham* (10 How., U. S., 82) the Supreme Court said:

Every State has the undoubted right to determine the status of domestic and social condition of the persons domiciled within its territory.

In *Pennoyer v. Neff* (95 U. S., 722) the Supreme Court said:

But except as restrained and limited by the Constitution of the United States a State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants.

It is thus shown that even in the absence of a statute specially relegating the question of marriage in pension claims to the laws of the various States (act of August 7, 1882) the question would have to be determined there on the broad general principle that a marriage valid where contracted is valid everywhere.

1 Greenleaf on Evidence, par. 545; Story on Conflict of Laws, pars. 80, 81, 113; Browne on Domestic Relations, p. 12; Am. & Eng. Ency. of Law, vol. 3, p. 600.

The only test that can be applied is that of the validity of the marriage by the law of the domicile of the parties. If the court of last resort in a given State declares that certain established facts are sufficient to show a valid marriage there, then the Department, under the law, is controlled by such a decision. In each case it is necessary to determine the facts, and then to ascertain what the courts of the State have declared to be the law applicable to said facts in cases of marriage.

In the Cartwright case (*supra*) certain brothers and sisters and a mother of a decedent filed a bill in partition of the decedent's estate. The bill was framed on the theory that the decedent left no heirs capable of taking by inheritance. On hearing, the bill was dismissed and the complainants prosecuted a writ of error. A woman claiming to be the widow of the decedent with a minor child appeared before the lower court, and it was there held that she was the widow and the child was an heir. The Supreme Court reversed the decision of the lower court. The opinion will be found almost in full in the case of Mary B. McCollum. (6 P. D., 93.)

In that case, one Braxton B. Lewis married by ceremony one Zerelday Cacey on December 8, 1843, in the State of Illinois, but at the time of such marriage he had an undivorced wife living in the State of Kentucky.

In 1846 the Kentucky woman secured a divorce from Lewis, and it was contended that the living together of Lewis and his second wife after the removal of the impediment gave rise to a common-law marriage, good within the State of Illinois. The supreme court said no. It is stated in the opinion that as the second marriage was void no presumption of a new contract was warranted, the facts showing that the second wife was in ignorance that her marriage was not legal, and the husband made no move on his own behalf to change the relationship which began illicitly.

On this point the supreme court of Illinois said in the Cartwright case:

What evidence is there that Lewis ever consented to or even desired to change his connection with Zerelday from an illicit to a matrimonial one. He took no steps to remove the impediment to his marriage with her. The divorce was not sought by him, but was obtained by his former wife in 1846.

In the same opinion the court said:

Where both parties are married in the honest belief, founded on an apparently good reason, that they are capable of entering into the marriage contract, when in fact one of them is not, if they continue to cohabit as man and wife after the removal of the impediment to their lawful union, the law will presume a common-law marriage by the acts of the parties in the absence of any evidence to prevent such presumption. In such a case there are many strong and cogent reasons for presuming a new marriage after the removal of the impediment, even though the parties may not have known of its removal. There the cohabitation, in ignorance of facts rendering it illegal, is not to be regarded as meretricious or criminal until the parties have knowledge of such facts.

So far as the facts in this case appear from the evidence they differ materially from those in the Cartwright case (*supra*) and which controlled and gave rise to the decision by the Illinois court.

This claimant having capacity to marry married the soldier in good faith, believing he had capacity to marry her, but as a matter of fact he had an undivorced wife living, but on his own petition he secured a divorce from her, the decree being signed on January 7, 1889, some three months after the marriage in issue, which was celebrated on October 11, 1888. There is wide distinction to be noted in the two cases. In the Cartwright case Lewis married a woman while he had a wife living, and although he lived for over thirty years with her he took no step to change the relationship from an illicit to a matrimonial one. In the case under consideration, so far as the evidence establishes, the soldier on his own petition secured a divorce from his first wife shortly after the marriage, thus evidencing in the most emphatic manner his desire to remove any impediment to the marriage. It is manifest that the two cases are fundamentally different, and it was error to hold that under the decisions of the supreme court of Illinois this claimant would not be recognized as the widow of the soldier, certainly not under the Cartwright case (*supra*).

The legal phase of the case, however, need not be further considered at this time for the reason that the facts as appearing from affidavits and records are too meager upon which to rest a judgment. The only way in which the facts can be fully ascertained is by special examination, and the claimant has made out such a case as to entitle her to the aid of an investigation by the Bureau.

Accordingly the papers are returned in order that they may be sent to the field for special examination.

1. The special examiner should secure a certified copy of the records of the circuit court of Cook County, Ill., showing when the soldier filed his bill for divorce from his first wife and when default was taken.

2. The claimant should be cross-examined and her reasons in full recorded, how she became satisfied that the soldier had capacity to

marry her on October 11, 1888, she knowing at the time that he had been married before and that his first wife was not dead.

3. After January 7, 1889, did the claimant join with her husband in any deed of transfer or mortgage of real estate? If so, when? A copy of said deed or mortgage should be secured.

4. Evidence of acquaintances and friends knowing the relationship of the parties on and after January 7, 1889, should be obtained.

5. Did the claimant and her husband join any church or other society after January 7, 1889?

6. Was any life insurance carried by soldier, and who was the beneficiary, and what was the date of the policy?

7. Any and all facts bearing upon the issue here presented should be investigated and, if possible, evidence secured in regard to same.

When the report of the special examiner shall have been received and considered by you the papers should again be transmitted to the Department, together with your further report for final action on the appeal.

As the case has been made special this matter should be promptly attended to.

PATHOLOGICAL SEQUENCE—MALARIAL POISONING AND DISEASE OF HEART.

PHOEBE A. CLOUGH (WIDOW).

The soldier was pensioned for a gunshot wound of the right hand and malarial poisoning. No other affection was alleged or shown to have been due to his military service. He died suddenly, in 1898, from dilatation of the heart, which was secondary to valvular disease of that organ. There was no pathological relation between the malarial poisoning and the disease of heart which proved fatal, nor does it appear that the former affection was a material factor in causing the soldier's death.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 16, 1902.*

Phoebe A. Clough (now Goodrich) was pensioned under the act of June 27, 1890, as the widow of Seward Clough, late a sergeant in Company G, Ninth Maine Volunteer Infantry, certificate No. 488740. Her claim previously filed under the general law was rejected June 23, 1899, on the ground that the soldier's death from disease of heart was not due to the gunshot wound of right hand or malarial poisoning for which he was pensioned. This action was adhered to after additional testimony filed in the Pension Bureau had been duly considered.

An appeal to the Department from the aforesaid adverse action was filed May 29, 1900, by the attorney who had recently come into the case. He contends that the action was unjust and arbitrary and not in accordance with the evidence.

The soldier served in the aforesaid organization from September 23, 1861, to July 13, 1865, when he was honorably discharged. He was wounded in the right hand while in action at Petersburg, Va., June 24, 1864. The official records do not show the incurrence of any other disability, and the soldier is not reported absent at any time except when suffering from said wound.

In his original application for pension the soldier alleged, in addition to this wound, that he contracted fever and ague (or malarial poisoning) while serving in North Carolina, immediately prior to his discharge, and that he continued to suffer from that affection. This claim was legally approved, after a special examination, and the soldier received \$6 per month from the date of discharge to July 16, 1890, and \$8 thereafter. Under a claim which was pending at the time of his death the rating was further increased to \$12 from November 17, 1897, and the accrued pension was paid to the widow.

The soldier died January 26, 1898. The widow was married to J. B. Goodrich June 4, 1900.

In his declarations for increase of pension, filed in 1888 and thereafter, the soldier alleged that disease of the heart and other affections had resulted from malarial poisoning, but disease of the heart was not accepted as such result by the medical officers of the Bureau.

The reports of the several official examinations which were made from time to time, from 1881 to 1897, inclusive, did not show very marked evidences of disability from malarial poisoning, nor did the testimony adduced by the special examination indicate that there was serious disability therefrom. With reference to this affection, the report in 1887 stated as follows:

Skin, normal. Slight discoloration of conjunctivæ. Tongue, brownish coat at the back. Liver, normal. Spleen, tender; percussion area increased. General health, quite good.

Similar conditions were described in January, 1888, when the report contained the specific statement that the heart was normal.

Another report, made in October, 1888, revealed moderate enlargement of the spleen and some evidences of disorder of the stomach with functional disturbance of the heart's action.

In connection with the claim under which this examination was made there was filed an affidavit of Dr. Benjamin Bussey, jr., who certified that he had examined the soldier and found him afflicted with chills and fever, enlargement of the spleen, and disease of the stomach and heart; that he presumed the trouble of the stomach and indigestion were dependent on the splenitis; that the soldier was anæmic and had "the true anæmic murmur of the heart and some valvular disease;" that the heart was "at least one-fourth enlarged;" that in his opinion all these conditions were "the direct result of chronically enlarged spleen."

This testimony was largely discredited by the report of a test medical examination, made in January, 1890, which contains the following statement:

The abdomen is moderately full; tympanitic over colon; tenderness in both hypochondria. Liver of normal size. Spleen is tender on percussion, but normal in size. Heart is of normal position and size; its sounds are very weak, particularly the second; at times the second sound is hardly perceptible at apex. Tongue coated in middle, with red tip and edges. Skin and eyes normal. The man's health is evidently decidedly impaired.

The next report, made in 1891, stated that there was "some increase in size of the spleen," and that there was distress after eating, with acid eructations. The area of cardiac dullness was then shown to be slightly increased; the impulse of the heart was forcible.

The condition of the heart was not described in the report made in January, 1893. The next and last report, made in November, 1897, contains the following description:

The area of hepatic dullness is diminished, reaching only to a point 1 inch above free border of ribs. The spleen is enlarged to fully twice the normal size. It is tender on palpation and percussion. The skin is anæmic. Tongue clear. Ocular conjunctivæ decidedly yellow. There is evidence of some disturbance of the digestive functions. There is no impairment of the urinary functions. The urine is clear; sp. gr. 1.020; no albumen or sugar. * * *

The apex impulse of heart is faintly perceptible to sight and palpation, though there is quite generally diffused beating. The apex is 2 inches below and one-half inch within line of left nipple. The action and sounds are weak, but there is no irregularity or disturbance of rhythm. On standing the rate is 114, and after brisk exercise 152, which also causes quite marked dyspnoea. There is no œdema nor cyanosis. Claimant has dilatation of heart without compensatory hypertrophy. No other disabilities.

Dr. Charles E. Williams was a member of the board which made this examination (about two months before the soldier died) and he was also a member of the boards that made the examinations in January, 1888, and July, 1890. He testified as follows in an affidavit filed August 9, 1898:

I professionally treated Mr. Seward Clough occasionally during the last three or four years for dilated heart, but have no specific dates as charges were not made on my books at such times. The date of last treatment was January 24 or 25, 1898, being a short time before his death. * * * All his symptoms were unusually severe; shortness of breath, irregularity of action, disturbance of rhythm, and other symptoms of tendency to heart failure. I did not see him at time of death, which was sudden, but from description of symptoms, together with the knowledge that death occurred immediately after an unusually severe exertion, I am satisfied that his death was due to the disease of heart.

Such was the testimony upon which the claim was adjudicated. Dr. Williams made the official report of the soldier's death to the local authorities, and he stated therein that disease of heart was the cause of death. He did not in any statement, either alone or in conjunction

with others, ascribe the fatal disease of heart to malarial poisoning, nor was the affection of the heart directly ascribed to that cause by any of the examining surgeons.

The medical testimony filed after the rejection of the claim consists of the affidavits of Drs. F. F. Bigelow and A. B. Libby.

Dr. Bigelow certified that he had been acquainted with the soldier for about five years; that he first prescribed for him November 7, 1893, and treated him for four or five months; that at this time the treatment of the soldier was for disease of heart, "which he believed to be due to malaria contracted in the service;" that the physical examination revealed enlarged hepatic and splenic areas, digestive troubles, and other evidence of malarial infection. Dr. Bigelow was a member of the boards of surgeons that made the examinations in April, 1887, and October, 1888.

Dr. Libby certified that he had been acquainted with the soldier for about four years; that he prescribed for him June 14, 1894, for malaria; that he made a professional visit to him at his home September 6, 1895, when he was suffering from malaria and pain in the region of the heart; that he prescribed for him once or twice in 1897; that he was called at the time of death, and that in his opinion the cause of death was cardiac failure from malarial poisoning. It is probable that this physician rendered no service at the time of the soldier's death, for Dr. Williams made the report thereof to the authorities and had treated him only a day or two before his sudden demise.

The testimony of these three physicians, showing medical treatment of the soldier, covers only the period from November, 1893. It is evident that the soldier's heart was not affected in January, 1888, nor prior to that time, while it is shown that organic or valvular disease of this organ existed in 1889. This condition clearly preceded the dilatation which subsequently demanded treatment and which proved fatal "immediately after an unusually severe exertion," as stated by Dr. Williams. In other words, the evidence shows that the dilatation was secondary to the valvular affection.

Primary organic disease of the heart, such as is indicated in this case, is not recognized as a sequel of malarial poisoning by medical authorities, although it is admitted that the heart may be involved through digestive changes incident to profound malarial cachexia. As already stated, however, the proof in this case indicates that the evidences of malarial poisoning were not very considerable at and prior to the development of the valvular disease of heart. There was, therefore, no pathological relation between the malarial poisoning and the disease of heart which proved fatal, nor does it appear that the former affection was a material factor in causing the soldier's death.

After carefully considering the relative facts, the Department is clearly of the opinion that the action from which the appeal was taken

was neither unjust nor arbitrary, and that it was in accordance with the views of recognized medical authorities. The rejection of the claim is therefore affirmed.

DIVISION OF PENSION—ACT MARCH 3, 1899—RESIDENCE IN A SOLDIERS' HOME.

JOSEPHINE MEDLEY *v.* JOHN A. MEDLEY.

Where a wife bases her application for division of her husband's pension on the sole ground that he is an inmate of a State Home for soldiers or sailors, the question of desertion is not involved, and the rejection of such a claim, under the act of March 3, 1899, on the ground that "desertion complained of has not existed for six months," is error.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 16, 1902.

John A. Medley, late private, Company G, Ninth Illinois Infantry, and a pensioner at \$10 per month under certificate No. 889498, appealed July 18, 1902, from the Bureau action of May 28, 1902, allowing the claim of his wife, Josephine, filed February 24, 1902, for one-half his pension, on the ground that he was an inmate of the Soldiers and Sailors' Home at Quincy, Ill., and that she was a woman of good moral character and in necessitous circumstances.

Pensioner's only contention is that his said wife deserted him without cause.

Claimant denies desertion and charges pensioner with desertion.

In her application she based her claim for one-half her husband's pension solely upon the ground that he was an inmate of the State Soldiers and Sailors' Home at Quincy, Ill., and that she was a woman of good moral character and in necessitous circumstances.

The evidence in the case shows that at the date of filing her said application pensioner was and still is an inmate of the State Soldiers and Sailors' Home at Quincy, Ill.

Where a wife bases her application for division of her husband's pension on the sole ground that he is an inmate of a State Home for soldiers and sailors, the question of desertion is not involved, and the rejection of such a claim under the act of March 3, 1899, on the ground that "desertion complained of has not existed for six months" is error.

It appears that a former application of claimant filed March 20, 1901, in which the only allegations upon which she based her claim for a division of her husband's pension were that he was "an inmate of the Soldiers' Home at Quincy, Ill.," and that she was a woman of good moral character and in necessitous circumstances.

None of these allegations were denied by pensioner, and the United

States pension agent at Chicago, Ill., certified April 16, 1901, that pensioner was at date of his last payment, April 11, 1901, at Soldiers and Sailors' Home, Quincy, Ill.

The superintendent of the Home testifies that pensioner has been continuously a member of said Home since May 16, 1900.

No question of desertion was involved in that case, yet the Bureau, on May 24, 1901, rejected her said claim on the ground that "desertion complained of has not existed for a period of six months."

The result of said Bureau action of May 24, 1901, has been to unjustly deprive claimant of her legal right conferred by the second proviso of the act of March 3, 1899, and also to mislead pensioner as to his defense. He has filed testimony tending to show that his wife deserted him and he has based his appeal upon that ground; whereas desertion is immaterial under the second and third provisos of said act, as the wife's right to one-half her husband's pension in both said second and third provisos is granted to her in case her husband becomes an inmate of a State or National Home, she being a woman of good moral character and in necessitous circumstances, and not an inmate of said Home or a similar institution.

Claimant did not appeal from the Bureau rejection of her first application, but filed a second application based upon the same allegation as the first, and on the same state of facts shown under her first application which was rejected, and with no change in the law, her second application was allowed.

The later action appears to be justified by the facts as disclosed by the evidence and the same is affirmed.

While there is no appeal from the rejection of claimant's first application, for reasons already stated, said action was clearly error, and the Department of its own motion, hereby reverses the same.

The papers in the case are herewith returned and further action should be taken to correct the error of said first adjudication of May 24, 1901.

PATHOLOGICAL SEQUENCE—DISEASE OF HEART AND ERYSIPELAS.

ANNIE M. KEILER (WIDOW).

The attending physician during his last illness testified that the immediate cause of the soldier's death was "paralysis of heart, induced by erysipelas (facial)."

The decedent never filed a claim for pension under the general law, but did file a claim under the act of June 27, 1890, and was pensioned at the maximum rate thereunder for rheumatism, disease of heart, and other causes of disability, which he himself stated were "contracted since the war."

His widow, who was also granted a pension under the act of June 27, 1890, based her claim for pension under the general law on the alleged ground that inasmuch as the soldier had an attack of erysipelas during his military service and had a number of similar attacks subsequent to his discharge—during one of which he died—his death was due to his said service.

- Held:* 1. That the evidence in the case is insufficient to show that while in the service, or at any time subsequent thereto, the soldier had facial erysipelas; but does show that the year preceding his death he suffered from valvular disease of heart, resulting from rheumatism, which was probably the cause of his demise.
2. That erysipelas is recognized as an acute, self-limited, infectious disease—due to a micro-organism—which generally terminates within two weeks; and, though prone to recur, each recurrent attack is due to a fresh invasion of the erysipelas-producing organisms, and is not induced by, or a result of, a prior attack. An attack of such disease in 1894, even though it existed and caused the soldier's death, could not therefore have been a result of his military service.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 20, 1902.*

Annie M., widow of Wallentine L. Keiler, late private Company B, Eighth Maine Infantry, who is now pensioned under the provisions of section 3 of the act of June 27, 1890, filed a claim for pension under the general law June 20, 1895, wherein she alleged that her husband's death on the 5th of May, 1894, was due to "erysipelas causing disease of heart." And in the evidence subsequently filed in support of such claim, it is sought to be shown that the soldier contracted facial erysipelas in the service, and that having had numerous recurrent attacks of such disease subsequent to his discharge—one of which occurred just before his death—his demise was really caused by erysipelas.

The said claim was rejected March 9, 1896, "on the ground that the evidence fails to establish the service origin of the fatal disease." As will be observed, the name of the "fatal disease" is not stated; but such was the legal approval for rejection spread on the brief-face on said date pursuant to the following advisory opinion of the medical referee—dated February 11, 1896:

Erysipelas is a self-limited disease, due to a special germ.

Soldier could not, therefore, have had erysipelas of face thirty years, and if he had an attack of facial erysipelas during his service and died from another attack thirty years afterwards, the service can not be held responsible for his death, even if same was due directly to erysipelas, which is not shown.

The attending physician says he died from paralysis of heart.

Whether claimant (soldier?) had erysipelas when he had cardiac paralysis makes no difference.

The whole case is absurd from a medical standpoint and should be rejected without putting claimant to further expense in calling for useless testimony.

As above stated, the rejection of the claim under consideration was based upon the foregoing opinion of the medical referee as to the medical aspects of the case.

Subsequent to the rejection of the said claim, the claimant filed some additional evidence with a view to having the same reopened and reconsidered in the light of such evidence, but the Bureau held that the evidence in question was not sufficient to warrant any change in its former action in the premises.

On May 4, 1899, the attorneys for the claimant entered an appeal at the Department, wherein it is contended that the rejection of the claim was at variance with the evidence on file; that while it may be true, and doubtless is true, that erysipelas is regarded as an acute disease, it is not believed that it will be seriously contended that this is always true of such disease; that the evidence in the case shows that the theory that erysipelas is an "acute disease" is not well founded; that it is shown by the testimony of the captain and of three comrades of the soldier's company, and also by that of the hospital steward, that he contracted erysipelas while in the service and was under treatment therefor; that it is shown by other reliable evidence that when he reached home after his discharge his face and head were badly swollen in consequence of erysipelas; that other testimony has been filed showing continuance in a general way of the said disease, and that such evidence warrants the allowance of the claim.

It seems rather inconsistent for the attorneys in this case to admit that "erysipelas is regarded as an acute disease," and then, in the next breath, contend that the evidence in this case shows that the theory that erysipelas is an acute disease is not well founded. Especially is this true when it is considered that the disease in question is regarded as an acute disease by recognized medical authorities, and that the evidence in this case which is relied upon to controvert any such theory is wholly and solely that of lay witnesses, who can not be presumed to have any technical knowledge whatever as to the character of the disease in question. Furthermore, it is not a mere theory, but a demonstrated fact, that erysipelas is a self-limited disease—"runs an acute course and terminates by resolution, usually within a fortnight" (C. W. Allen, M. D.).

The evidence relied upon to show that the soldier had an attack of erysipelas while in the service is also entirely lay testimony, as is also that which has been filed showing the continuance, in a general way, of the disease in question subsequent to his discharge.

There is absolutely no medical evidence whatever on file going to show that the soldier ever had an attack of erysipelas prior to 1893, and that evidence is not as clear and conclusive as might be desired. The physician who gave this testimony, Dr. C. F. Mitchell, of Minneapolis, Minn., has made two affidavits in the case; one was executed and filed in 1894, the other in 1897. In his first affidavit this affiant states that he was the attending physician of the soldier at the time of his death, and that the immediate cause thereof was "paralysis of the heart, induced by erysipelas (facial)." He also testified in the said affidavit as follows:

I first treated him (the soldier) in 1893. He was suffering from a cardiac trouble, the heart being irregular and intermittent. The whole system seemed to be depressed, a run-down condition generally.

He was of a scrofulous diathesis, and my opinion is that he acquired this disposition during his service while in the army.

He had erysipelas during the war. Erysipelas is what he died of, the immediate cause being paralysis of the heart.

It is noted that while this affiant says that although the immediate cause of the soldier's death was paralysis of the heart, erysipelas is what he died of, he fails to give any history or clinical picture of an attack of erysipelas at any time during his treatment of the soldier. As a matter of fact, the only attack of erysipelas he mentions is the one alleged to have occurred during the war, about which he could, of course, have had no personal knowledge. And the doctor also says that the soldier was of a scrofulous diathesis, which, in his opinion, was acquired while in the army. There is nothing in the case, however, beyond this affiant's mere supposition that any such condition arose during the soldier's military service. However, if such a condition did arise during the soldier's service and continued to exist to a greater or less extent subsequent to his discharge, it is not impossible that the manifestations thereof may have been mistaken for erysipelas by laymen, although no such error should be made by a physician; yet, as heretofore stated, there is no description by a physician of an attack of erysipelas in this case.

Relative to the diagnosis of erysipelas, Tyson says:

The diagnosis is usually not difficult, although many conditions are called erysipelas by the ignorant which are not of this nature. The acuteness of the disease, the rapidity of its spread, the constitutional disturbance, and fever distinguish it from other conditions that superficially resemble it.

As to the etiology of the disease in question, this same writer says:

The streptococcus erysipelatis of Fehleisen is a minute, cleft fungus, a micrococcus in the narrow sense, 3 to 4 microns in diameter, arranged in pairs (diplococci) or chains (streptococci) of from 6 to 12 cells. The erysipelococcus resembles very closely the streptococcus-pyogenes of Rosenbach—in fact, it can not be distinguished from it microscopically—while even the cultures of the two organisms resemble each other very closely. * * * Simon asserts that the micrococcus of erysipelas is identical with that of pyæmia. Klebs suggests that more than one organism may be concerned in the causation of erysipelas.

The organism probably operates as a local irritant, producing the dermatitis. From this as a focus constitutional infection, as in diphtheria, is set up, probably through the influence of a toxin generated by the micrococcus. * * *

The organism is transferred from one person to another by direct contact, or by the intermediation of a third person, or through the atmosphere. It can not be said, however, that the disease is highly contagious in the absence of surgical injury, for in my early experience as a hospital interne at the Pennsylvania Hospital, and later as a visiting physician in the Philadelphia Hospital, though it was the custom to keep the erysipelas cases in the ordinary medical wards, I can not recall a single instance where the disease was communicated to another patient in the ward. It was very different, however, in the surgical wards, where the disease would spread rapidly from one patient to another, showing the importance of the open surface as a condition of the spread. The lying-in woman is very readily inoculated, so that no phy-

sician should attend a case of labor while attending one of erysipelas. Certain kinds of wounds, as lacerated wounds and scalp wounds, are especially prone to erysipelas. Clean-cut wounds in other locations suffer less frequently. Leech bites, the wounds of the cupping scarificator and of the subcutaneous syringe, are also favorable starting points. Chronic inflammatory processes and skin diseases may have erysipelas engrafted upon them.

In addition to the foregoing views of the above-mentioned observer it is deemed important to note that an accepted authority upon diseases of the skin, C. W. Allen, hereinbefore referred to and quoted, says:

The presence of various skin diseases, solutions of continuity of surface, as in traumas, the existence of acute or chronic disease of the throat and nose, lymphatic disease, such as seen in elephantiasis, all favor the entrance of erysipelas-producing organisms. I have, for example, seen repeated attacks of facial erysipelas in an old subject of chronic suppurative disease of the lachrymal duct. In like manner, one often observes the facial form in those whose nasal mucous membranes are in a pathological condition, and it is especially frequent where a naso-labial fissure exists.

It has been deemed important to thus set out the findings of the aforesaid observers in order that the fact that although, as one of them states, "relapses and recurrences of erysipelas are prone to occur," such recurrent attacks are, nevertheless, always acute attacks, due to a fresh invasion of the specific germ of the disease in question, either at the same or some other point of entrance, although there may be no discoverable local lesion, and are never subacute manifestations of a latent form of said disease, as no such form of the disease is recognized.

As to the prognosis of erysipelas, Tyson says:

The prognosis, in the vast majority of instances, is favorable. Only in the aged, the intemperate, and those of broken health from other causes does it prove fatal as a rule. Complications, especially meningitis and septic states, are causes of death. On the other hand, erysipelas is said to exert a favorable influence on certain acute diseases, such as acute rheumatism, choroiditis, and even morbid growths.

It has even been suggested to inoculate erysipelas for the cure of such affections.

Thus will it be seen—from all the facts in the case, as herein presented—that it is by no means established that the soldier had an attack of facial erysipelas in the service or at any time subsequent to his discharge therefrom, or that any such disease was a factor in the causation of his death; but even if it were shown that he did have such an attack during his service, that he did have recurrent attacks of said disease at more or less frequent intervals subsequent to his discharge, and that his death occurred during one of these recurring attacks and was due either wholly or in part thereto, it would, nevertheless, by reason of the very nature of the disease in question, as herein pointed out, have to be held that his military service was not responsible for his death. It might be contended with equal force of argument that the death of a soldier many years subsequent to his military service from acute lobular pneumonia was due to such service, because he had had an attack of a similar nature while in the service and had also had

a number of such attacks after his discharge therefrom, as "no acute disease recurs with such frequency, there being instances on record of individuals who have had ten or more attacks." (Osler). Each attack of this disease, however, must be regarded as a fresh invasion of the microorganism or specific agent of such disease—the diplococcus pneumonia of Fraenkel. In addition to being the most frequently recurring, pneumonia is also one of the most fatal of acute diseases, as "it carries off one out of every four or five attacked." (Osler.) And also as to the prognosis of this disease, Tyson says:

Pneumonia is a treacherous and uncertain disease at any age. Young, robust men of 25, taken mildly ill, with every reasonable expectation of recovery, sometimes die suddenly and unexpectedly. On the other hand, while in the old and intemperate it is especially dangerous, old men and women over 70 often recover completely. The intemperate are less fortunate, yet even among them some surprising recoveries are observed. * * *

The question involved in this case has been thus discussed at length with a view to showing that although some acute diseases are prone to recur, and that—in some instances—one attack may predispose to another, it does not follow that because an individual may have had an attack of a certain acute disease, and subsequently has another attack of the same disease, the second attack was induced by, or the result of, the said first attack. In other words, it is futile to contend that had the individual not had the first attack he would have been immune from such disease thereafter. The contentions set up in the pending appeal are, therefore, held to be untenable.

Another point deemed worthy of note in this case is the fact that the soldier himself never filed a claim for pension under the general law on account of any cause of disability whatsoever, but did file a claim for pension under the provisions of the act of June 27, 1890, wherein he alleged that he was incapacitated for the performance of manual labor by reason of "rheumatism, chest-disease, catarrh, and resulting disease of throat, defective eyesight, kidney-disease, affection of ears, and partial deafness—contracted since the war." It will be observed that he makes no mention of erysipelas as a cause of disability, which would have hardly been the case if he had been so often and so severely afflicted with such disease as his widow says that he was.

In a newspaper clipping filed in the widow's claim herein considered, which refers to her candidacy for a certain office in a certain organization, the statement is made that—

Mrs. Keiler is the widow of Comrade W. L. Keiler, Company B, Eighth Maine. At the battle of Gettysburg, at the "Bloody Angle," on the third day, Comrade Keiler received a mortal wound.

The object of filing this clipping is not apparent, as nothing in it has any bearing whatever upon any question involved in her said claim; and the statement quoted is palpably error, as the soldier did not enlist until December 12, 1864, about eighteen months after the

battle of Gettysburg was fought. He could not, therefore, have been wounded, either "mortally" or otherwise at such battle. Furthermore, as hereinbefore stated, he did not die until May 5, 1894.

Dr. Mitchell, whose testimony in the premises has heretofore been referred to, made the return of death in this case. The causes of death assigned in such return were "erysipelas, paralysis of heart."

The soldier's aforesaid claim for pension under the act of June 27, 1890, was allowed October 13, 1899, at the rate of \$12 per month from December 26, 1891, the date of filing such claim, to May 5, 1894, the date of his death, the maximum rate under the said act, for "rheumatism and disease of heart, lungs, and kidneys," the accrued pension having been paid to his widow. He was not examined under this claim, either by a board of surgeons or by a single surgeon—the said approval having been made and rate allowed upon the evidence filed in both his and the widow's claims, respectively. The only medical evidence, however, that was filed in either claim as to the physical condition of the soldier was the aforesaid testimony of Dr. Mitchell. This affiant said that, in addition to a number of other causes of disability, the soldier had valvular disease of heart—probably a result of the rheumatism which this affiant also says that he had. And, in the judgment of the Department, it was probably this said organic disease of heart, and not paralysis of heart resulting from erysipelas, as testified to by Dr. Mitchell, that was not only the immediate, but also the prime and only, cause of the soldier's death. At any rate, it is not shown that his death was due to his military service, either in the manner alleged or in any other way whatsoever. The action appealed from is, therefore, affirmed.

DIVORCE—COHABITATION—HUSBAND AND WIFE—MARRIAGE.

LETTIA GLOVER (WIDOW).

The evidence shows that the claimant applied for a divorce from the soldier and a legal decree was subsequently issued by the Mason County circuit court, in the State of Kentucky, on January 13, 1883. The evidence further shows that she continued to cohabit and live with the soldier as his wife, in Maysville, Ky., up to the date of his death.

Held: That, as she was once legally divorced, and common-law marriages are not valid in the State of Kentucky, she is not the legal widow of the soldier, and therefore not entitled to pension under the act of June 27, 1890. See case of Mary Munsel (9 P. D., 30).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 20, 1902.

Lettia Glover, as widow of William L. Glover, formerly a private in Company A, Fortieth Regiment Kentucky Volunteer Infantry, and who died October 27, 1886, was pensioned under the act of June 27,

1890, from August 3, 1891, to August 4, 1898, at which time her pension was discontinued on the ground that she was divorced from the said soldier in 1883. On July 19, 1900, the claimant, through her attorney, filed an appeal, contending that she never knew that she was divorced and that she lived with her husband up to the date of his death.

The testimony and evidence that make up the record in this claim show that on May 6, 1861, this claimant was united in marriage to the soldier at Aberdeen, Ohio, by Squire Shelton, and that they lived together as man and wife from the time of their marriage up to the date of the soldier's death, rearing a family of children, and during the greater part of their married life resided at Maysville, Mason County, Ky.

It further appears from the record that some time prior to 1883, because of marital disagreements, this claimant consulted an attorney with a view of instituting divorce proceedings against her husband. The petition for divorce was filed, and on January 13, 1883, a decree of divorce was duly issued to this claimant out of the Mason County circuit court. She contends that she did not know that the divorce was granted, that she never appeared in court after she made the complaint, and that she and her husband made up and settled their differences the same day. At any rate, the evidence clearly shows that the claimant and her husband continued to cohabit as man and wife, and she attended and nursed him in his last illness.

On September 23, 1898, the claimant testified before a special examiner as to her marriage to the soldier in 1861, and further stated that she was 61 years of age; that she did apply for a divorce in Mason County, but was never notified in regard to the matter and was never in the court-house after filing her divorce suit; that she can not remember the name of the attorney who filed her petition; that when said petition was filed she gave the names of certain persons as witnesses, but she has no knowledge of any testimony having been taken from any of the said persons; that she never told her husband that a divorce has been granted, for the reason that she never knew it.

Numerous other witnesses, who were neighbors of the claimant and reputable, worthy citizens, testified before the special examiner that the claimant and her husband lived together as man and wife, and that they never heard that the claimant had ever been granted a divorce or had ever applied for one.

The special examiner stated that the original witnesses for the claimant as to her nondivorce were persons of high standing in Mason County, and that they were all astonished when they learned from him that the court records showed that she had obtained a divorce from her husband in 1883, and that, as a matter of fact, a hundred affidavits could be obtained in Maysville as to no divorce between the claimant and the soldier, and that he was unable to find anyone in the town who ever heard of the divorce proceedings.

The examiner further certified that the claimant appeared to be sincere and honest in her conviction that no divorce had been granted; that in an interview with her attorney who secured the divorce he stated that he advised her that a decree had been granted, and that he had no further conversation with her in relation to the matter, and that he did not receive a fee for his services in the case.

The claimant signs by mark and she is evidently uneducated. In a moment of anger at her husband she filed a petition for divorce, but the marital dispute seems to have been settled immediately, and she continued to live with her husband up to the time of his death. With her limited knowledge of court proceedings and their consequences, it is fair and charitable to presume that her contention is correct—that she did not think she was divorced from her husband.

From the standpoint of equity the evidence and circumstances connected with this case would seem to incline toward the claimant; but, unfortunately for her status as a pension claimant, the divorce proceeding instituted by her was adjudicated, and on January 13, 1883, a legal decree of divorce issued out of the Mason County circuit court, and this claimant was not the legal wife of the soldier after the said decree was granted. See case of Mary Munsell (9 P. D., 30).

The fact that after the decree was granted the claimant and the soldier lived and cohabited together as man and wife is satisfactorily established by the evidence. In many States this might establish a common law marriage, but the claimant is again unfortunate in that this condition does not prevail in the State of Kentucky, wherein she and the soldier resided.

Up to July 1, 1852, the common law on the subject of marriage prevailed in Kentucky, whereby cohabitation and recognition as husband and wife by a free male and female, regardless of color, who were competent and able to contract, was sufficient to establish a legal marriage.

On the above-mentioned date the Revised Statutes of Kentucky went into effect, which declared void all marriages not solemnized in the presence of an authorized person or society. This has remained the law of Kentucky ever since the adoption of the Revised Statutes. It is therefore evident that such cohabitation and recognition as man and wife, after the legal decree of divorce had been granted, could not legalize the union of the claimant and the soldier as a valid marriage, however constant and sincere it may have been.

There is no allegation of fraud as to the divorce proceeding and no evidence that would ever lead to the presumption of fraud. The court records, duly certified by the clerk of the Mason County circuit court, show that a legal decree of divorce was issued.

After a careful consideration the Department is unable to find a legal reason for disturbing the action of the Pension Bureau in discontinuing this claimant's pension. The action appealed from is accordingly affirmed.

SERVICE—ENLISTMENT—MUSTER—SECTION 4693, R. S., AND ACT JUNE 27, 1890.

JEFFERSON M. HUMAN.

A soldier may be pensionable for disability incurred prior to the date of his muster into the service of the United States, muster in not being an essential to a pensionable status. (Section 4693, R. S.)

The Department declines to alter or modify the prevailing practice under the act of June 27, 1890, so far as the dates of enlistment and muster in affect the length of service in a claim under said act.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 20, 1902.

Jefferson M. Human, an alleged private in the Tennessee Volunteer Infantry and Cavalry, filed his declaration for pension under the general law on August 4, 1880, claim being rejected on July 16, 1887, on the ground that the alleged disabilities existed prior to his entrance into the United States service. It was again rejected on May 3, 1895, on the ground that claimant was not captured while in line of duty, and therefore not entitled to a pension by reason of a disability contracted while a prisoner of war. An appeal was filed on April 24, 1899, the same was considered by the Department in an opinion promulgated on October 30, 1901, said opinion holding that the claimant enlisted on September 7, 1862, was discharged on July 12, 1865, was captured some three days after enlistment, and that, having been in the service from and after September 7, 1862, he was entitled to pension for any disability incurred between said last-mentioned date and the date of his discharge, provided other material facts were shown. After this opinion was promulgated it was forwarded by your predecessor to the War Department for another report in the case, and with the purpose of obtaining the view of the said Department upon the question as to when a soldier's service commences, that is: Does it commence at the date of enlistment or of muster in? The papers in the case have been again returned to this Department with a letter under date of December 26, 1901, said letter being at considerable length and containing a later report of the War Department, together with certain other matter embodying a construction of section 1219, Revised Statutes, as set forth by the Judge-Advocate-General, the Secretary of War, the Attorney-General, and the Comptroller of the Treasury. The conclusion of the War Department relative to the status of Human is as follows: That Human, prior to his muster in—

was a civilian who was awaiting acceptance by the Government of his proposal to enter the military service of the United States,

elaborate reasons being given for the conclusion that no soldier's term of service commences until he is mustered in. The letter of December

26, 1901, raises several issues, which, in the interest of brevity, may be stated as follows:

First. When does a soldier's service commence in so far as his pensionable status is concerned?

Second. Is it the purpose of the Department to hold, in the present case, that claimant was in line of duty when captured, and during the imprisonment resulting from such capture?

Said letter also requests answers to the following interrogatories, viz:

1. Whether a soldier is pensionable for disabilities incurred prior to date of muster into the service of the United States.
2. Whether in computing the length of service of a soldier in claims under act of June 27, 1890, the time between date of enrollment and date of muster in shall be included.

In order for a proper understanding of the points at issue the following quotations are made from the reports furnished by the War Department:

The records of this office show that the within named Jefferson M. Human, Companies F and A, Fourth Tennessee Cavalry, was enrolled September 7, 1862. The Auditor for the War Department reports under recent date that this soldier was first paid from enlistment September 7, 1862, to June 30, 1863, while a member of Company A, Fourth Tennessee Volunteer Cavalry. The record of this man's enlistment being uniform, clear, and positive, and having been accepted, at the time of his muster in, by a sworn and duly authorized officer, it can not now be amended upon the unofficial testimony submitted.

The record further shows:

Jefferson Human, private, Company F, Fourth Tennessee Cavalry, was captured on or about September 10, 1862; escaped from Salisbury, N. C., on or about January 15, 1863, and joined his command about June 1, 1863. He was enrolled in company F, Fourth Tennessee Cavalry, September 7, 1862, and mustered in with company June 30, 1863.

The record further shows Human as—

Discharged July 12, 1865.

The main issue in this case is as to the date of commencement of service for pensionable purposes.

Section 4693, Revised Statutes, grants a pension to—

Any enlisted man, however employed, in the military or naval service of the United States, * * * whether regularly mustered or not,

who contracts a disability while in the line of duty in said service. Under this section muster in is not an essential, and the date of the muster in of Human is, therefore, wholly immaterial for the time being. The question is, Was he in the service? And if the record of the War Department shows him to have been in the service, the next query is, When did such service commence?

(It is again observed that the record shows him as enlisted on September 7, 1862, mustered in June 30, 1863, and discharged on July 12, 1865.)

That enlistment is a contract is not to be doubted; it has been so repeatedly held by the Supreme Court of the United States. When one has enlisted, his status undergoes a complete change and a citizen becomes a soldier. (In re. Grimley, 137 U. S., 152.) Enlistment and enrollment are practically synonymous terms, so far as the issue under consideration is concerned, and when a man enlists he tenders his services as a soldier in compliance with invitations and inducements held out by the Government. His proffered service is accepted by the Government conditionally (1 Winthrop on Mil. Law, 761-775), the case being simply one of a conditional contract between an employer and a would-be employee, in which the employer accepts the offered service for the time being—putting off the formality of ratifying the contract until a future time—conditioned upon certain things which must be shown to exist on the part of the would-be employee. If the employer, after being satisfied that those certain things do exist, ratifies the contract, it is binding from the date on which the employer conditionally accepted the offered service. If, in the case of a soldier, he is paid from the date of enlistment, such fact is not per se conclusive that his contract with the Government commenced on the date of his enlistment; yet such fact is very strong evidence that the date of his contract is identical with the date of his enlistment.

So far as discoverable after careful search, it is believed that, for pensionable purposes, the commencement of service has been held to be that of the date of enlistment, in general and ordinary cases, for the past twenty years. It is possible that the Department has, in some of its opinions, used language that might convey the contrary idea; but it is believed, after very careful investigation and mature deliberation, that such cases are rare and exceptionable and against the settled opinion of this Department.

The War Department, from its standpoint, does not admit that a soldier is in the military service of the United States prior to the date of his muster in; and said conclusion may be correct from the point of view of the said Department. It is not for this Department to dispute it; but such view ought not to bind this Department in the matter where a soldier claims pension, for the very cogent reason that a soldier's pensionable status is described by acts of Congress, the construction and application of which are vested by law only in the Secretary of the Interior. The status of a soldier as affecting questions in other departments is an entirely different matter from that of his pensionable status before the Department of the Interior; and the very law itself (section 4693, R. S.) forbids to this Department such a conclusion as is arrived at by the War Department from its standpoint. It ought not to need any extended discussion to demonstrate it to be not only the province, but the duty of each executive department to, itself, interpret the laws governing its own administration,

more especially when such laws are upon matters peculiarly in the province of each; and that the construction of the statutes by one department is not binding upon another department; a fortiori, when the law so construed has nothing whatever to do or in common with the question at issue and the principles involved before the other departments. (See opinions of Attorneys-General; 5 Op., 390; 7 Op., 700; 9 Op., 36; 11 Op., 470. See also 7 L. D., 700.)

A lawful administration of the pension laws is impossible without knowledge of certain facts, many of them being of record, and of record only, in the archives of the War Department. It is to the last-named depository that this Department must look for a transcript of its records of facts, the same as do the other branches of the executive in matters pertaining to them. It is, however, for the Department of the Interior, in matters relating to pension, to draw its own conclusions from such facts. Such must be true from the very necessities of the case and under the law. Any opinion of the head of an executive department, so far as it may—collaterally even—have to do with the question before this Department, is entitled to and is given great weight. Nevertheless, when this Department has the facts before it in a pension claim it must, under the law, reach its own conclusions. It can not shift the burden or divide the responsibility by accepting, against its own judgment and conscience, the conclusion of another department upon a question wholly incumbent upon this Department to decide. (See opinion in the case of David H. Dyer, 9 P. D., 87.)

The question as to the necessity of muster has been frequently discussed by this Department, notably and exhaustively in the cases of Randolph M. Manley (5 P. D., 295, and 20 Atty. Genl. Op., 322) and Daniel B. Tyler (12 P. D., 385), it being conclusively demonstrated in both of said opinions that muster in claims arising under the pension laws is not, necessarily, a question affecting the pensionable status of a soldier. Section 4693, R. S., expressly excludes it, and the principles laid down in said opinions upon this matter will not be departed from.

The Department is aware that, under the rules and regulations of the War Department, the status of a soldier in the volunteer service and that of one in the Regular Army is not the same at enlistment. It is not unmindful that, in the case of volunteer troops, a muster into the United States service is deemed necessary by the War Department to transfer, so to speak, such troops from the State service into the service of the United States. These facts, however, do not concern the present issue, which is one of pensionable status, for section 4693, R. S., is a statute of general application in pension cases and includes, by its express terms, "any enlisted man, however employed, in the military or naval service of the United States."

The opinion in the case of George W. Hill (7 P. D., 235), has been

cited as holding that this Department would be bound by the conclusions of the War Department as to the length of service of a soldier. A careful review of said opinion demonstrates that it does appear to so hold, but a thorough investigation shows that such a conclusion was reached by reason of a misapplication of a rule of the Supreme Court of the United States, laid down in the opinion in the case of *United States v. Johnson* (124 U. S., 253). As a matter of fact, said rule has no application whatever to the issue in the Hill case, and a reference to the cited opinion of the United States Supreme Court makes the truth of this statement clearly apparent without discussion. Under such circumstances the holding referred to in the Hill case, *supra*, is hereby expressly overruled.

An attempt has been made to show, notwithstanding the record in this case, that Human did not enlist on September 7, 1862, and the War Department has been asked to amend its record in view of certain facts elicited at a special examination, but said Department has refused to amend its record, and holds September 7, 1862, as the date of Human's enlistment.

The record showing that claimant enlisted on said last-mentioned date, and the record not having been impeached, this Department accepts the record date of his enlistment, and it therefore follows that Human was in line of duty when captured, some three days afterwards, while going with other comrades to the rendezvous.

The Department finds as a fact that Jefferson M. Human enlisted on September 7, 1862; was captured on September 10, 1862; was mustered in on June 30, 1863, and was discharged on July 12, 1865. It also finds as a fact, basing its finding upon the record, that Human was in line of duty when captured.

It finds as a matter of law that the military service of Human commenced on the date of his enlistment, viz, September 7, 1862.

In answer to the interrogatories propounded, the Department replies:

1. A soldier may be pensionable for disability incurred prior to the date of his muster into the service of the United States, the question always being, Was he in the service and line of duty when the disability was incurred?

2. The Department declines to alter or modify the practice which has been uniformly followed since the passage of the act of June 27, 1890, so far as the dates of enlistment and muster in affect the length of service in a claim under said act. See cases of *William N. Veach* (12 P. D., 273); *John S. Robinson* (11 P. D., 390); *John Trout* (11 P. D., 435); *Nancy Rathon* (9 P. D., 162); *George W. Fleck* (7 P. D., 343), and *William N. Davis* (7 P. D., 333).

The departmental opinion promulgated in this case on October 30, 1901, is adhered to, the action therein appealed from being reversed.

MARRIAGE AND DIVORCE—PRIOR MARRIAGE—IMPEDIMENT.

ALICE FRANKLIN AND ELLEN FRANKLIN (CLAIMANTS AS WIDOWS).

Claimant Alice married the within-named soldier in 1863, and he deserted her about the year 1868. She subsequently attempted to contract two other marriages, and the soldier died, after said attempts, in the year 1894.

Held: Claimant's subsequent marriages were void ab initio for the reason that she had a living and undivorced husband at the dates on which she attempted to contract said marriages. She is now the widow of soldier.

Claimant Ellen married soldier in the year 1869, and he died in the year 1894. Soldier at the date of his marriage with claimant had a living undivorced wife, and said wife is now living.

Held: Claimant is not the widow of the soldier in question.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 20, 1902.

Alice, as alleged widow of John W. Franklin, formerly a private in Company H, One hundred and eighty-second Ohio Volunteer Infantry, filed her application under the act of June 27, 1890, on November 22, 1898, claim being rejected on October 2, 1900, in the following language, viz:

Rejected on ground that claimant was not the widow of the soldier at the time of his death in 1894, her divorce from Stephen Day, in 1888, being presumptive and sufficient evidence that she had ceased to be the widow of the soldier, and had become the legal wife of said Day prior to 1888.

Ellen Franklin, an alleged widow of the same soldier, filed her application under said act on May 9, 1896, claim being rejected on October 28, 1898, in the following language, viz:

On the ground that claimant is not the legal widow of the soldier, he having a former wife living and undivorced at the date of claimant's marriage to him.

An appeal in the claim of Alice was filed on November 5, 1900, and in that of Ellen on December 26, 1900.

Special examination was held in this case, and it appears that Alice Ramsay and John W. Franklin were married in Adams County, in the State of Ohio, on August 4, 1863, by Thomas Shelton, a justice of the peace. There is no record that a license was ever issued, but the parties in interest lived and cohabited together as man and wife until probably 1868, when the soldier deserted claimant and went down the Mississippi River into Kentucky. Two children were the fruit of this union, and claimant, Alice, admits that there was never any divorce between herself and Franklin. This affiant states that after Franklin's desertion, probably eighteen months thereafter, she married one Jonathan Hyde, in the State of Kentucky, and lived with him until his death in 1876. In 1880 she removed to Brown County, Ohio, and there married one Stephen Day, living with him until the year 1888, when, so she states, Day obtained a divorce from her in the State of Ken-

tucky. Since she gave this testimony she has denied that any divorce was ever obtained between herself and Day, and said Day is now living.

On October 5, 1869, Franklin, who was then living in Kentucky, married one Ellen by ceremony, and they appear to have continued to live together as man and wife until his death, on April 16, 1894. It appears, by the testimony of this claimant, Ellen, that the soldier informed her he had parted from his wife, Alice, for the reason that their marriage was illegal, having been performed by the justice of the peace without a license. Soldier also told claimant that he had proposed to get a divorce from Alice, but that a lawyer, name unknown, advised him that a divorce was not necessary, because of the illegality of the marriage. This claimant, Ellen, appears to have been fully cognizant of all the facts concerning soldier's marriage with Alice, and it is extremely probable, upon a careful review of the evidence, that said Alice was cognizant of the fact that her former husband had remarried; but at this point it is well to observe that her attempted marriage with Hyde was probably consummated a year before her former husband married Ellen.

The above are all the necessary facts, as shown by the evidence. They appear to be uncomplicated, and the law applicable thereto is exceedingly simple. The soldier and Alice Ramsay were married in 1863, and lived together as man and wife until 1868. In said last-mentioned year the soldier deserted his wife, and within one year the said wife, in defiance of the law, married another man. The soldier, also in defiance of the law, married Ellen not long after, and it is clearly evident that both of the said second marriages were illegal and void ab initio, for the reason that the soldier and Alice had never been divorced. The fact that a marriage license was not obtained, if such a statement is true, does not mitigate in favor of either of the parties. The marriage without a license might have subjected the officer who performed it to punishment, and in some States might subject the interested parties, also, to punishment, but it would not make the marriage invalid. (Stewart on M. & D., sec. 97.)

The subsequent marriage of Alice does not alter the law, and if, when she consummated such marriage, she had a living and undivorced husband, this marriage was also void.

Ellen, one of the claimants herein, can not hold herself outside the law because the soldier told her that his marriage with Alice was illegal. The law is the same no matter what he told her.

The claimant, Ellen, has no title as the widow of the soldier, and it is plainly evident, under the law applied to the facts, that Alice, during the lifetime of the soldier, did not cease to be his lawful wife.

This opinion, declaring as it does that Alice is the widow of the soldier, does not bestow a pensionable status upon the last-named indi-

vidual. Her conduct in attempting to remarry in probably less than a year after the soldier deserted her, was in the teeth of the law, and so was her subsequent attempt at another marriage. Another question is now involved which should be disposed of in the readjudication of the claim of Alice, but which will not be now further discussed by the Department.

In view of what has been said, the rejection of the claim of Ellen is sustained, and the rejection of the claim of Alice, according to the terms set forth on the face brief, is held to be error, and is reversed.

DIVISION OF PENSION. ACT OF MARCH 3, 1899—SEPARATION.

ELIZABETH ANN COATS *v.* ANDREW COATS.

1. The evidence in this case fails to satisfactorily show that pensioner's absence from claimant since March 3, 1899, was in opposition to her wishes or against her consent.
2. Separation by mutual consent does not constitute desertion (*Rothery v. Rothery*, 11 P. D., 77-377). Consent may be inferred from conduct (*Ingersoll v. Ingersoll*, 49 Pa. St., 249).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 20, 1902.

Mrs. Elizabeth Ann Coats, alleged wife of Andrew Coats, late corporal of Company E, Fifth New York Infantry, and first lieutenant, Seventh United States Colored Troops, and a pensioner at \$6 per month under certificate No. 123557, appealed July 24, 1902, from the Bureau action of June 26, 1902, rejecting her claim filed February 12, 1902, for division of her alleged husband's pension because of desertion, on the ground that pensioner was divorced from claimant June 30, 1869, at Chicago, Ill.

Claimant contends that this was the first intimation she had that pensioner was divorced from her; that she received no notice of his application for divorce, and that if any such divorce was obtained, it was procured by fraud and without notice, and is therefore void; that at the time said alleged divorce was obtained she was a resident of Baltimore, Md., and that her said husband was living at Newbern, N. C.; that about August, 1867, he compelled her to return to her parents at Baltimore, Md., with the simple statement that he did not want her any more, after which he did not communicate with her or send her any money, and since which time she had no knowledge of his whereabouts from August, 1867, until April, 1902.

Pensioner contends that when claimant visited him at Newbern, N. C., in 1867, he was sick in bed, and she left him and returned to her parents, where she had always lived as long as he knew her; that he remained continuously at said Newbern, where he was stationed

and on duty in the service of the Government, until 1871, four years after she left him, and has ever since resided in New York City, with the exception of four years spent in Colorado at the Soldiers' Home; that claimant must have been fully aware of his whereabouts, as she corresponded with his sister, Mrs. Baker, who lived in the city of New York up to the date of her death, about 1899.

The evidence shows that the parties were married in Baltimore, Md., June 12, 1862.

Claimant testified, April 15, 1902, that pensioner deserted her about 35 years ago and has never contributed toward her support since that time.

Pensioner testified before the special examiner, June 20, 1902, that after their marriage he left her with her parents in Baltimore and returned to his regiment; that she afterwards visited him in camp; that he sent her money regularly up to the time that he was divorced from her, June 30, 1869, although he did not live with her for three or four years before he obtained his divorce; that after that he was not bound to support her.

Claimant waived her right to be present at the examination of pensioner, in person or by attorney, alleging lack of sufficient means.

Pensioner has filed what purports to be a copy of a record of the recorder's court of Cook County, Ill., showing that an action for divorce was commenced May 19, 1869, by one Andrew Coats v. Elizabeth A. Coats, in which a decree was entered June 30, 1869.

Without passing upon the sufficiency of this evidence to establish the fact of divorce between these parties, it is evident that pensioner believed that he was legally separated from her, and that his failure to cohabit with and support claimant subsequent to 1869 was based upon his belief that he was under no legal liability. This negatives the idea that he intended to desert her.

Assuming that claimant's contention that the cause of their separation was pensioner's statement "that he did not want me any more," it would appear that she acquiesced in his desire for a separation and returned to her parents without objection; that she had made no effort to find her said husband, nor did she in any manner indicate a desire to renew the marital relation with him since 1867.

This indicates that the separation was with her consent. Mere separation is not desertion. *Rothery v. Rothery* (11 P. D., 77-377). Consent may be inferred from conduct. *Ingersoll v. Ingersoll* (49 Pa. St., 249).

The burden of proof to establish desertion on the part of pensioner is upon claimant.

The Department is of the opinion that the evidence in this case fails to satisfactorily show that pensioner's absence from claimant since March 3, 1899, was in opposition to her wishes or against her consent.

For these reasons the action appealed from is affirmed.

REMARRIAGE—DEPENDENT MOTHER—ACT JUNE 27, 1890

REBECCA BURTON (MOTHER).

The remarriage of a dependent mother subsequent to the passage of the act of June 27, 1890, and prior to the filing of her claim, under section 4707, as amended by said act, does not affect her pensionable status, if she is shown to be dependent within the meaning of the law.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 25, 1902.

The claimant, Rebecca Burton, now Worden, is the mother of Taylor E. Burton, deceased, who served as a recruit in Company A, First Battalion, Sixteenth United States Infantry, from August 25, 1866, until his death, September 13, 1866. The father of said soldier (claimant's first husband) died December 13, 1852. She afterwards remarried and her second husband died in 1869. March 7, 1893, she remarried, and was divorced from her third husband in 1894. November 3, 1897, she filed a claim for pension (No. 372752) as dependent mother of said deceased soldier. Her claim was rejected March 17, 1899, on the ground that she had remarried since the death of soldier, and prior to filing her claim, and therefore had no title. Subsequent to that action she made two separate requests to have the claim reopened, but in March, 1900, it was again rejected on the ground that she had no title, as she remarried after the passage of the act of June 27, 1890.

From that action she appealed June 23, 1900, contending that such action was erroneous.

The question before the Department is, did her remarriage, subsequent to the passage of the act of June 27, 1890, and prior to the filing of her claim thereunder, debar her from a pension?

Section 1 of the act of June 27, 1890, provides—

that in considering the pension claims of dependent parents, the fact of the soldier's death by reason of any wound, injury, casualty, or disease, which, under the conditions and limitations of existing laws, would have entitled him to an invalid pension, and the fact that the soldier left no widow or minor children, having been shown as required by law, it shall be necessary only to show by competent and sufficient evidence that such parent or parents are without other present means of support than their own manual labor or the contributions of others not legally bound for their support.

In discussing the meaning of the above section, in the case of Elizabeth Darling (10. P. D., 244), the Department held that under the provisions of said section the only facts necessary for the claimant to prove in order to secure a pension were:

(1) That her son died by reason of causes which would have entitled him to an invalid pension; (2) that he left no widow or minor child; (3) that she was his parent, and was at the date of filing her application, after June 27, 1890, and subsequent thereto, without other present means of support than her manual labor, or the contributions of others not legally bound to her support:

and it further held, specifically, that the remarriage of a dependent mother prior to the act of June 27, 1890, was not a bar to pension thereunder.

In this case the fact of the claimant's marriage subsequent to the passage of the act of June 27, 1890, and prior to the filing of her claim, can not affect her pensionable status, when it is shown that she is dependent within the meaning of the law, with no means of support other than her manual labor. If remarriage prior to the act of June 27, 1890, would not debar her from a pension (and it is so decided in the case of Elizabeth Darling, *supra*), there is no tenable reason why remarriage subsequent to said act and prior to the filing of the application should have such an effect, the question being, Is she a dependent mother under said acts? The evidence shows that she remarried in 1893 and was divorced from her husband in 1894, and that she had no means of support at the time of filing her claim. The action appealed from was erroneous, and is therefore reversed.

MARRIAGE AND DIVORCE—ACT MARCH 3, 1901.

ANNIE M. PALMER, NOW UMBERGER (WIDOW).

It appearing from the evidence in this case, and from this appellant's own admission, that she was divorced from her second husband, Thomas E. UMBERGER, upon his application, she has no title whatever, under the provisions of the act of March 3, 1901, to restoration of the pension she formerly received as the widow of the deceased soldier, David D. Palmer.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 26, 1902.

Annie M. UMBERGER, formerly Palmer, filed in the Pension Bureau on June 24, 1901, an application under the provisions of the act of March 3, 1901, for restoration of the pension she had formerly received as widow of David D. Palmer, late a sergeant in Company A, Fourteenth Iowa Volunteer Infantry.

This application was rejected on August 2, 1901, upon the ground that she had no title to restoration of said pension under the provisions of said act, for the reason that she had not been divorced from her second husband, Thomas E. UMBERGER, upon her own application, and by reason of his fault and misconduct, but that said second husband had procured a divorce from her upon his application.

From this action of rejection the present appeal was taken on September 13, 1901.

The provisions of the act of March 3, 1901, under which this application for restoration of widow's pension is made, read as follows:

That any widow who was the lawful wife of any officer or enlisted man in the Army, Navy, or Marine Corps of the United States, during the period of his service in any war, and whose name was placed or shall hereafter be placed on the pension

roll because of her husband's death as the result of wound or injury received or disease contracted in such military or naval service, and whose name has been or shall hereafter be dropped from said pension roll by reason of her marriage to another person who has since died or shall hereafter die, or from whom she has been heretofore or shall be hereafter divorced, upon her own application and without fault on her part, and if she is without means of support other than her daily labor, as defined by the acts of June twenty-seventh, eighteen hundred and ninety, and May ninth, nineteen hundred, shall be entitled to have her name again placed on the pension roll at the rate now provided for widows by the acts of July fourteenth, eighteen hundred and sixty-two, March third, eighteen hundred and seventy-three, and March nineteenth, eighteen hundred and eighty-six, such pension to commence from the date of the filing of her application in the Pension Bureau after the approval of this act.

It not only appears by a certified transcript of the decree of divorce dissolving the marriage of this appellant to her second husband, Thomas E. Umberger, that said divorce was obtained upon the application of said Umberger, and was granted to him by the court, but this fact is admitted by the appellant in the present appeal.

It is therefore apparent from the foregoing provisions of the act of March 3, 1901, that she has no title whatever to restoration thereunder of the pension that she formerly received as the widow of the deceased soldier, David D. Palmer.

The rejection of appellant's application for restoration of her former pension was, consequently, manifestly without error, and is affirmed accordingly.

MINOR'S PENSION—AGE—ACT JUNE 27, 1890.

GEORGE W. ROBINSON (MINOR).

It appearing that this appellant was over the age of 16 years at the date of the soldier's death, he has no title whatever to pension under the provisions of the third section of the act of June 27, 1890.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 26, 1902.*

George W. Robinson filed in the Pension Bureau on October 22, 1900, an application for pension under the provisions of the third section of the act of June 27, 1890, as a minor child of Nicholas W. Robinson, formerly a private in Company C, Twenty-fifth Indiana Volunteer Infantry, which was rejected on January 21, 1901, upon the ground that said claimant was shown to have been over the age of 16 at the date of the soldier's death, and had no title to pension as a minor child under said section.

From this action the present appeal was taken on February 28, 1901.

It appears from the papers in this case that the soldier died on September 12, 1894, and that Mary Ann Robinson, the mother of this appellant, was pensioned as his widow from said date and was last paid

said pension to November 4, 1900. It furthermore appears, and is so stated by this appellant, that he was born on July 10, 1865. He was therefore long past the age of 16 years at the date of the soldier's death in 1894, and could have no title to pension under the provisions of the third section of the act of June 27, 1890, in any event, even though it did not appear that the soldier's widow had survived him and had been allowed a pension in her own right. It is alleged by the appellant that his mother, widow of the soldier, is dead, but the date of her death is not given, and no proof whatever of the fact of her death has been produced. It is contended by the appellant that he is permanently helpless from paralysis and has been so from infancy, and is entitled under the proviso to the third section of the act of June 27, 1890, to succeed to the pension upon the death of his mother, soldier's widow, notwithstanding the fact that he was over the age of 16 years when his father died.

This contention is wholly untenable, and has no foundation whatever to rest upon in the provisions of the law. The proviso to the third section of the act of June 27, 1890, provides for the continuance or renewal of a pension that has been allowed to, or on account of, the child of the soldier under 16 years of age who is shown to be insane, idiotic, or otherwise permanently helpless, but no provision whatever is made therein or elsewhere in the pension laws for the allowance of pension to the child of the soldier, under any circumstances, who was over 16 years of age at the date of his father's death.

The rejection of this application for minor's pension was therefore clearly without error, and is affirmed accordingly.

MINORS—EVIDENCE—PROOF OF AGE—APPROXIMATE AGE.

CAROLINE MILLS (WIDOW.)

Minors' pension having been withheld on account of claimant's inability to prove the exact dates of birth, a special examination is ordered to obtain, if possible, sufficient data from which to approximate said dates.

A minor's pension should not be withheld because the exact date of birth can not be shown; it is sufficient for all purposes, if the date can be approximated with sufficient certainty so that the Government does not pay beyond the period of pensionable minority.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
August 15, 1902.*

Caroline, as widow of Lewis Mills, formerly a private in Company D, Fifty-eighth United States Colored Volunteer Infantry, was granted a pension, under the act of June 27, 1890, on February 1, 1897, application having been filed November 23, 1895, but payment on account of any children was withheld because of claimant's inability to prove the dates of their birth. An appeal was filed May 5, 1900.

This claimant asserts that she was married to the soldier in 1868, nine children having been born to them, four of said children being under 16 years of age at the date of the filing of the application. Special examination was held, and she stated that Lucinda was born November 12, 1884; Lewis, February 3, 1886; Thomas, August 10, 1888, and Carrie, March 12, 1890. These dates were taken from a memorandum book, which was copied from a piece of paper which had become soiled and torn. Claimant asserts that when the original data was made on the piece of paper she had a better memory than she has now, but cross-examination brought out the fact that the original data was made after she filed her claim for pension. It is plainly evident, and claimant admits, that she could not at the time recall even the years in which her children were born, save she was positive that Carrie was born in March, 1890.

This claim was very superficially examined, and the special examiner seems to have wholly failed in his endeavor, if in fact he made any, to approximate the dates of the birth of the children at issue. It is not enough that the dates of the births of children can not be exactly shown, for it is the expressed opinion of this Department that, provided a child's age can be fairly approximated, and that at a date when it is plainly evidence that the Government can not be the loser, such an approximate date may be accepted in pension matters. See the opinion in the case of *Minors of James Height* (8 P. D., 469).

This claimant filed her application in 1895, and asserted the birth of the oldest child interested as November 12, 1884. The special examination was held in January, 1897, and had this case been properly investigated it would have been a comparatively easy matter, at the time, to discover within a year or two the date of the birth of said eldest child. As the matter now stands, Lucinda is supposed to be 18 years of age at the present time, Lewis 16 years, Thomas 14 years, and Carrie 12 years. It is believed that two avenues are open whereby the dates of birth of all the four children can be approximated at present, provided the claimant's statement is within the bounds of reason.

First. Another special examination should be held and the claimant carefully and shrewdly questioned in regard to any event happening about the time of the births of these children or of any earlier or later incidents which may enable her to fix the dates with a fair degree of certainty. This claimant is of that class of individuals who reckons dates from the happening of certain events and not from absolute memory of the events at issue, and it is quite probable that a special examination conducted along the lines suggested will bring out many important facts.

Second. After the special examination has been held it is directed that these four children be taken before a full examining board, and

that said examining board, by such physical examination as may be deemed by them to be opportune, give their opinion as to the approximate age of each and their reasons for such opinion in each case. The said examining board should be furnished with all facts obtained by the special examiner, and these facts, together with the results of a physical examination and further examination by said physicians by closely questioning the claimant, will undoubtedly afford sufficient data whereby the ages of these children may be approximated at such dates as will result in no loss to the Government. When such special and medical examinations have been held, the papers are to be again returned to the Department without any further conclusive action by the Bureau.

Courts of equity, as well as of law, will not, where property rights are involved, decline to enforce a bestowal of such right because, the age of a person being a material issue, such age can not be definitely shown. They will fix some date, if within the bounds of possibility, by approximating it, always making the interested claimant bear the burden of any doubt, as against the party he claims against. He will not be deprived of his whole right when substantial justice can be meted out to all persons interested.

Following this doctrine, it is held that a claim for minors should not be rejected upon the ground that the exact dates of births can not be established. It is sufficient, for purposes of admission, if the dates of the births can be approximated with a degree of certainty which will do substantial justice to the claimants, and, on the other hand, so that the Government will not pay them a pension after the minors have reached their pensionable majority.

MARRIAGE AND DIVORCE—EVIDENCE—LAWS OF TENNESSEE.

ANNIE HUSTON, ALIAS RICHARDSON (WIDOW).

The claimant was the legal wife of Dennis Dean on and after May 26, 1866. She thereafter, on May 30, 1876, attempted to marry the within-named soldier. Dean lived until the year 1893, claimant's second husband living until December 18, 1892. Dean and claimant were never divorced.

Held: Claimant is not the widow of the soldier in question. (McReynolds v. The State of Tennessee, 5 Cold., 20, and Margaret Gilbert, 8 P. D., 249.)

Claimant will be presumed to have known Dean to have been alive when she contracted her second marriage under the rule made by the Supreme Court in the case of *Oliver v. Piatt* (3 Howard, 333).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 29, 1902.

Annie, alleged widow of Jackson Huston, alias Richardson, formerly a private in Company E, Eighty-eighth United States Colored Volunteer Infantry, filed her application, under the act of June 27,

1890, on November 27, 1893, claim being rejected on April 15, 1901, on the ground that claimant was not the widow of the soldier in question. An appeal was filed on October 16, 1901.

Careful special examination was held in this case, and it was satisfactorily shown that claimant and one Dennis Dean were married in the State of Tennessee during slavery, by the custom usually prevalent in such cases, and with their owners' consent, a separate cabin being set apart for their use. They thus lived together for some little time, when soldier enlisted, but appears to have gone back and forth during his service from the army to his home, the cohabitation being practically uninterrupted. When the soldier was discharged on April 30, 1866, he returned to the claimant and continued the matrimonial relation for some little space of time. At some date, not precisely determinable, but perhaps in the early part of 1867, he deserted the claimant and married another woman. He lived until the year 1893, when he died at the home of his son who was the offspring of claimant. On May 30, 1876, this claimant married the soldier herein and appears to have lived with him as his wife until December 18, 1892.

On May 26, 1866, the following act was passed by the legislature of the State of Tennessee:

All free persons of color who were living together as husband wife in this State, while in a state of slavery, are hereby declared to be husband and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired, or that may be hereafter acquired, by such parents, to as full an extent as white children are entitled to under existing laws of the State.

In the case of *McReynolds v. The State of Tennessee* (5 Cold., 20), the issue was as to the legality of marriage under an indictment for bigamy. This was in the year 1868, and the court said:

If the plaintiff in error had married before his emancipation, and had continued to live and cohabit with his wife he had married while in a state of slavery after their freedom, it was a legal assent and ratification of the marriage; and the plaintiff in error, having married another while the first marriage existed, was guilty.

No argument is necessary to show that the claimant and Dennis Dean were lawfully husband and wife and that this claimant married the soldier herein in defiance of the law, Dennis Dean being still alive and undivorced.

Inasmuch as Dean outlived claimant's second husband and was never divorced from her, there is no process of reasoning whereby she can be held to be the widow of Huston.

There is some intimation in the claimant's testimony that she honestly believed Dean to be dead, and that her second marriage was one of good faith. If such were the case, the issue might fall under section 3293 of the Code of Tennessee, which is as follows:

A second marriage can not be contracted before the dissolution of the first. But the first shall be regarded as dissolved for this purpose if either party has been absent five years and is not known to be living.

Many of the States have similar statutes which have been construed by the supreme courts of the several States.

The Department is not aware that the supreme court of the State of Tennessee has ever passed upon the statute in question under an equivalent state of facts such as are shown in the case under discussion. The State of New York has a similar statute, which is as follows:

If any person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority (section 6, chapter 8, article 1, volume 3, page 2332, N. Y. R. S.).

The court of appeals in passing upon this statute in its opinion in the case of *Gall v. Gall* (114 N. Y., 109) said:

He can not shut his eyes and ears and justify a second marriage because for five years he did not hear of his wife. Did he try to hear of her? Did he make inquiries?
* * * Was he excused from inquiry by a false report of her death?

The doctrine announced by the court of appeals in the State of New York is eminently sound, and there is no good reason to believe, in the absence of direct proof to the contrary, that the supreme court of the State of Tennessee would depart from the principles which lie behind the doctrine. The presumption is that one knows certain facts which are material, said facts being easily obtainable by the exercise of ordinary diligence. The Supreme Court of the United States said, in discussing such a principle, in their opinion in the case of *Oliver v. Piatt* (3 Howard, 333):

(Syllabus.) A party, put by the circumstances on inquiry as to a fact, is affected with constructive notice thereof.

The question in this case was whether or not one of the parties knew of the existence of certain facts when the true facts were easily ascertainable by him had he used even ordinary diligence. The court said in the body of its opinion:

If, under the circumstances, he chose to remain in ignorance and indifference to the title, it was a voluntary ignorance and indifference which ought not to be permitted to avail him against the right of the cestui que trust.

A long list of cases, covering practically every State in the Union, could be cited as authority for this rule.

The within case shows that claimant well knew that her marriage with Dean was a valid one, and at no time after Dean's desertion does it appear she took any means whatever to discover his whereabouts. They were living at Memphis, Tenn., and claimant states that he "went across the river" and she never heard of him afterwards. She once asked a woman who lived "over the river" if she had ever heard of Dennis Dean, the reply being in the negative. Robert, the son of Dean and claimant, testified that after Dennis deserted claimant—probably a year after—he came back home and took affiant and his brother

away with him to his home where he was living with one Anna, at Colliersville, Tenn., the place where Dean and claimant lived during slavery. Here they resided some two or three years, when Dean and his family moved across the Mississippi River to Crawfordville, Ark., living in said place all the rest of his life, indulging in two more matrimonial ventures, and finally dying in the year 1893. Dean's residence during the entire period of desertion was within a radius of 25 miles of claimant's home at Memphis, Tenn.; she certainly knew that he was alive when he took her two children from her, and the exercise of the merest kind of ordinary diligence would have apprised her of the fact that he was alive at and long after her marriage with the soldier. It seems very improbable, from the testimony in this case, that this claimant was unaware of Dean's whereabouts; but if she was ignorant, it was a voluntary ignorance and indifference, for the means of ascertaining the information necessary were easily within her reach.

So far as this particular issue is concerned, the case seems to be a parallel one with that of Mary F. Barker (8 P. D., 48), wherein it was held:

Whatever puts a party upon inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty and it would lead to the knowledge of the requisite fact by the exercise of ordinary diligence.

It can not be denied but that it was claimant's duty to exercise due diligence in ascertaining the whereabouts of Dean before she attempted to contract a second marriage.

So far as the facts and law are concerned regarding the validity of the marriage of claimant and Dean, they are equivalent to those in the case of Margaret Gilbert (8 P. D., 249), and the doctrine in the Gilbert case and in the Barker case, *supra*, is adhered to and followed.

Action affirmed.

MARRIAGE—EVIDENCE—SECTION 4705, REVISED STATUTES, AND ACT OF AUGUST 7, 1882.

MINOR OF JACK REDBIRD.

Section 4705 of the Revised Statutes does not exclude proof of marriage under section 2 of the act of August 7, 1882.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 29, 1902.

This appellant, George Redbird, on April 4, 1874, filed a claim, No. 216095, for pension as minor child of Jack Redbird, who died September 17, 1863, while a member of Company D, Second Indian Home Guards, Kansas Infantry.

Said claim was rejected first in December, 1899, on the ground that

the soldier was not in line of duty when killed, being then absent from his company on leave of absence to attend to private business; and, finally, in December, 1901, on the ground that the claimant is not the legitimate child of the soldier (a tribal Cherokee Indian)—

for pensionable purposes, the marriage of the soldier to the claimant's mother not being such a marriage as is contemplated by section 4705, Revised Statutes, which is the law governing marriages of colored and Indian soldiers.

In appeal filed January 16, 1902, it is contended that the marriage of claimant's parents, of which he was the issue, was valid under the tribal customs of the Cherokee Nation, where contracted, and that he is legitimate accordingly for pensionable purposes, notwithstanding the provisions of said section 4705.

The brief face of this claim has attached the following opinion, signed by the Commissioner of Pensions:

The soldier and the mother of the claimant were both Cherokee Indians, and the claimant has no title to pension unless it is shown that he was the child of such a marriage as is provided for by section 4705 of the Revised Statutes.

This section provides that "the widows of colored and Indian soldiers and sailors who have died or who shall hereafter die by reason of wounds or injuries received or disease contracted in the military or naval service of the United States and in the line of duty shall be entitled to receive the pension provided by law without other evidence of marriage than satisfactory proof that the parties were joined in marriage by some ceremony deemed by them obligatory, or habitually recognized each other as man and wife, and were so recognized by their neighbors, and lived together as such up to the date of enlistment when such soldier or sailor died in the service, or, if otherwise, to date of death; and the child born of any marriage so proved shall be deemed and held to be the lawful child of such soldier or sailor."

In this case it appears from the evidence that the soldier and the claimant's mother were never married by any actual ceremony, but they began to live together according to the custom of the Cherokee Indians some time in the early '50s, and continued to live together from that time until the death of the mother in the fall of 1860, and that the claimant was born of such cohabitation. The cohabitation did not continue until the soldier enlisted, September 2, 1862, having ended by the death of the mother in 1860. In order to entitle the minor child of an Indian marriage, such as shown, to a pension, the marital relation must be shown to have continued up to the date of enlistment when the soldier died in the service. It is the children of such marriages only that are held to be the lawful children of such soldiers for pensionable purposes. When the cohabitation ceases prior to the soldier's enlistment there can be no title to pension, and it is not material whether or not it ceased by voluntary act of the parties or by the death of the mother. (See decision of the honorable Secretary of the Interior, under date of January 9, 1899, in case of minors of William Toller, vol. 10, p. 75.)

The claim will therefore be rejected on the ground that the claimant can not be recognized as the lawful child of the soldier for pensionable purposes, as there was no such marriage between the soldier and his mother as contemplated by section 4705 of the Revised Statutes of the United States relating to the marriage of colored and Indian soldiers and sailors.

H. CLAY EVANS, *Commissioner*.

The gist of this opinion lies in the statement that "the claimant has no title to pension unless it is shown that he was the child of such a marriage as is provided for by section 4705 of the Revised Statutes."

This holding, however, is not supported by the cited decision of the Department, which was rendered in a case involving a slave marriage, one not alleged or appearing to be valid under the laws of the place where the parties resided, or to be provable in that claim under any other law than said section 4705. No question arose, therefore, in that case as to whether the legitimacy of the claimants therein might be established otherwise than as prescribed in that section.

The only question therein was whether the child of a colored soldier who did not cohabit with the child's mother to date of the soldier's enlistment, when he died in service, is within the purview of said section, and that decision is authoritative upon that question only.

Upon the authority of that decision this claimant may be held to be not within the purview of said section 4705, as his mother died two years before his father's enlistment. He alleges, however, that his parents were lawfully married members of the Cherokee Nation of Indians, living in tribal relations, and that he was the legitimate issue of their marriage; and the only question herein is whether his legitimacy is thus provable, for pensionable purposes, notwithstanding said section 4705, section 2 of the act of August 7, 1882, providing:

That marriages, except such as are mentioned in section 4705 of the Revised Statutes, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued.

Marriage is recognized throughout the United States as a domestic status which is determinable as to its validity solely by the law of the place where it is contracted (*Patterson v. Gaines*, 6 How., 550; *Meister v. Moore*, 96 U. S., 76); and a marriage which is valid where contracted is valid everywhere (*Story on Conflict of Laws*, sec. 105, 113).

The Cherokee Nation of tribal Indians has been held by the Supreme Court of the United States to be a distinct political community, subject, as to the domestic status and affairs of its members, to its own laws (*Worcester v. Georgia*, 5 Pet., 515; *Cherokee Nation v. Georgia*, 5 Pet., 1).

A marriage made by a member of the tribe within the tribal territory, according to tribal rites, customs, or recognition, is regarded by the courts of other jurisdictions of the United States as a valid marriage, although it may be by the tribal law determinable at the mere will of the parties.

In *Johnson v. Johnson's Administrators* (30 Mo., 72, and 77 Am. Dec., 298), the principal question in the case was as to the (Indian tribal) marriage of Johnson with the Indian woman previous to his marriage to the plaintiff and the legitimacy of his children by that woman, and the court held such marriage valid and the children legitimate, stating that—

It is plain that among the savage tribes on this continent marriage is merely a natural contract, and that neither law, custom, nor religion has affixed to it any

conditions, or limitations, or forms other than what nature itself has prescribed. It can hardly be said that the power of divorce, in one or both of the parties to the contract, at his or her pleasure, is inconsistent with the law of nature. The fact, as we have seen, is otherwise.

In *Morgan v. McGhee* (5 Hemph. Tenn., 14) the court say as to a Cherokee Indian tribal marriage (the kind alleged in this claim):

To hold this marriage to be void would be to vitiate all the marriages made in the nation and might be productive of much mischief.

And a similar Choctaw marriage was held valid in the case of *Wall v. Williamson*. (8 Ala., 48; 11 Ala., 839.)

Such a marriage, therefore, as is alleged herein is a valid marriage "according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued," as specified in the act of August 7, 1882, and is provable herein, under said act, unless it be of the class of marriages which are by it expressly excepted from its operation, viz, "such as are mentioned in section 4705 of the Revised Statutes." The alleged marriage herein is manifestly not of this excepted class, as the parties did not cohabit to date of the soldier's enlistment, which has been held to be an essential element of the marriage which is provable under said section.

It is noted that the exception in the act of August 7, 1882, is not as to marriages generally in the cases of colored and Indian soldiers, but only as to "such marriages" of these soldiers as are mentioned in said section 4705. If Congress had intended that all cases of colored and Indian soldiers should be provable as to marriage only and solely under said section 4705, it would doubtless have provided plainly in said act of August 7, 1882, that "marriages except in cases of colored and Indian soldiers" should be provable as provided in that act. By limiting the exception, however, to "such marriages" only "as are mentioned" in said section 4705 Congress evinced a clear intent to make other than those marriages provable according to the general rule established by that act, which was merely confirmatory of the rule which had theretofore existed in practice. The language of said section 4705 itself denotes, by plain implication, that "other proof of marriage" was contemplated by Congress as admissible, the proof mentioned in said section being declared merely to be sufficient, "without other proof," for pensionable purposes.

To give to said section 4705 the exclusive construction given it in this claim would result in defeating the direct, affirmative grant of pension contained in section 4702 of the Revised Statutes, which grants pension to the widows and minor children of all soldiers and sailors who die from causes of service origin. Said section 4705 was manifestly not intended to be in derogation of any other statute or of any pensionable rights whatever, but was clearly intended to be only auxiliary to and in aid of the laws granting pensions, enabling cer-

tain grantees of those laws "to receive the pension now provided by law without other proof of marriage" than as specified in said section, and leaving unimpaired the right of those or of other grantees to receive such pension, granted them by said section 4702, by proving marriage in any other way.

Statutes in *pari materia* are to be construed harmoniously, so that each may have, if possible, its full effect (Sutherland on Stat. Constr., secs. 239, 240); and a statute is not construed as exclusive unless that intent clearly appears (Endlich on Interpretation of Stat., sec. 208).

It is, therefore, held that, in establishing marriage in claims on account of colored or Indian soldiers or sailors who died from causes arising in service and line of duty, said section 4705 does not exclude proof of marriage by the law of the place where the parties resided at the time of marriage, or at the time when the right to pension accrued, as provided in the act of August 7, 1882.

The evidence in this claim tends to show the claimant was the legitimate child of the soldier under a Cherokee Indian tribal marriage. The testimony, however, is meager, conflicting, and unsatisfactory, and before final adjudication of the claim it should be submitted for a thorough special examination as to the validity of such marriage and the claimant's domestic status thereunder. There should be a particular investigation and report of the facts as to the alleged marriage of the claimant's parents, whether there was any ceremony or rite of any kind, whether it was recognized by them throughout their joint lives and by the community as a valid marriage under the laws and customs of the Cherokee Nation, and whether appellant was similarly recognized as a legitimate child of the soldier at the time of the latter's death. Testimony should be procured as to what was then held and considered by the Cherokee Nation to be marriage, and as to what were the essentials in the formation of the relation, so that the sufficiency or insufficiency of the facts in appellant's case to show a valid tribal marriage and his legitimacy may be intelligently determined.

The papers are returned herewith accordingly for such examination, upon completion of which they should be retransmitted, with your report, for the final disposition of the appeal.

SERVICE—MILITIA—MUSTER.

SARAH A. FOWLER (WIDOW).

Held; that the soldier's service in the Pennsylvania Emergency Militia gives a pensionable status; and that the prior soundness of the soldier, the incurrence of the disability alleged in service, its existence at discharge and continuance until death are sufficiently shown to sustain his claim for pension. The said disability is also shown to have been a large contributing factor in the death cause of the soldier, the preponderance of the evidence tending to show that it was the direct and sole cause of death; and the widow is entitled to a pension.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 30, 1902.*

John E. Fowler, formerly a soldier of Company C, Forty-fifth Regiment Pennsylvania Emergency Militia Infantry, was enrolled June 30, 1863, and mustered out with his company August 18, 1863.

March 28, 1881, he filed his declaration for pension under the general law, alleging chronic diarrhea, contracted in service about July 10, 1863. Before action was taken thereon the soldier died, on March 25, 1899, and April 26, 1899, his widow filed her declaration for widow's pension under the general law, alleging that the soldier contracted chronic diarrhea in the service and died from the results of same.

May 16, 1900, the latter claim was rejected on the grounds—

(1) That the above-named company was a State organization, and said company was not called into the United States service by the President, and said service is not pensionable.

(2) That the evidence fails to establish service origin and continuance of any disability. There is no record or medical testimony of existence of disability in service or near discharge.

On the same day the soldier's pending application was rejected on the grounds—

(1) That the above-named service in which incurrence is alleged was not a pensionable service; said Company C was a State organization not called into the United States service by the President.

(2) That the evidence fails to establish service origin and continuance of alleged chronic diarrhea. There is no record or medical testimony of existence of said diseases in service or near discharge.

The Bureau letter of rejection, dated May 16, 1900, states only the first of the stated grounds of rejection in each case, and on the reverse side thereof is indorsed the appeal taken by claimant from said action in both cases, which was filed on June 6, 1900, and in which it is contended that the said regiment and company were called into the United States service by the authority of the United States, and that the same were under the direct command of a United States officer.

In support of his contention he cites the fact that pension has been allowed to Andrew Green, of said company and regiment, by certificate No. 971514, he having no other service.

A report from the War Department dated February 15, 1900, states:

The Forty-sixth Regiment Pennsylvania Militia Infantry (Emergency of 1863) was a Pennsylvania State militia organization, not mustered into the military service of the United States. In this connection attention is invited to the letter (R. and P. 257, 145) from this office to the Commissioner of Pensions, dated February 13, 1899, touching the military status of Joseph M. Knap's battery, Pennsylvania militia, in the case of Walter Morris, late private of that battery.

Since the date of that letter the status before this Department of none of the Pennsylvania emergency militia organizations of 1863, of which the Forty-sixth was one, has been changed by legislation.

A report from the office of the Auditor for the War Department, dated January 25, 1900, states that the soldier—

Was paid for one month and nineteen days. He was paid by the State of Pennsylvania on State pay roll, and the State was reimbursed by the United States under an appropriation by Congress April 12, 1866, by a settlement made by this office October 24, 1867.

There is also with the record a "certificate of exemption for a drafted person on account of disability," dated November 5, 1863, stating the soldier—

Having been drafted and claiming exemption on account of disability has been carefully examined and is found to be unfit for military duty by reason of chronic diarrhea, and in consequence thereof he is exempt from service under the present draft.

Henry B. Huff, captain of the soldier's said company, states in affidavit June 2, 1898, that the soldier about July, 1863, in the service and in line of duty—

Contracted chronic diarrhea in its worst form, and which was the result of exposure such as the change of diet, water, and weather * * * and by reason of said disease he was sent to his home * * *

and in his responsive letter to the Bureau, dated November 15, 1898, the same witness states that the soldier has suffered with the same ever since and that he was a sound man when he enlisted.

This witness is corroborated by Andrew Green, a comrade of the soldier, who stated in affidavit October 14, 1897, that the soldier, about July 10, 1863--

Got the chronic diarrhea in almost its worst form, in fact he was so that he could scarcely get about, as he was so reduced in flesh and weakness. * * * I have been personally acquainted with claimant for over thirty-seven years, and I know that when we enlisted together in said company and regiment he was free from the diarrhea, and my acquaintance with him was such that I would have known whether he had diarrhea at the time or prior when we enlisted, and since we have been discharged he has simply been a shadow. * * *

And in his responsive letter to the Bureau, filed December 14, 1897, the same witness states:

Knew John Fowler for years before he entered the service, and he was a stout, robust man. But in June, 1863, while camping at Huntingdon, Pa., he was taken home because he was not fit for duty; his trouble became chronic, and to this day it is the same as it was in 1863. * * *

N. J. Mervine and Sarah A. Fowler stated in joint affidavit May 31, 1898:

He came home on furlough in July, 1863, suffering with chronic diarrhea, terribly. * * * And when he was to return to his regiment he still suffered with the same, and when he returned home after being discharged he still complained and suffered with the chronic diarrhea, and was reduced in flesh * * * and he has suffered with the same more or less each year from July, 1863, to this present time, * * * and he has been very often confined to his home with said disease.

Dr. J. Y. Christy stated in affidavit June 18, 1889, that he has been acquainted with the soldier since June, 1863, and that—

Previous to July, 1863, he had good health. In October, 1863, I gave him medicine for diarrhea, and up to 1870 I gave him medicine for this disease. * * *

A special examination was held to determine origin and continuance of diarrhea and the cause of the soldier's death, at which witnesses testified in substance, as follows:

The claimant testified that the soldier—

Died March 25, 1899, of chronic diarrhea or from weakness as a result of that disease. * * * During his last illness his bowels moved from four to six times a day until within a few days of his death, after he was unable to take any nourishment. * * * I was married to soldier November 21, 1861. * * * From the time of our marriage until 1863 my husband had no sickness or disease at all except an occasional attack of quinsy which would last a few days at a time. * * * My husband suffered more during the months of July and August each year than any other months. When he was feeling the best he was obliged to go to the closet three or four times each day the year round, and sometimes had to go ten or more times a day. * * * For fifteen years or more Dr. George Price has been our family physician. Dr. Fay called a few times during my husband's last illness, but I don't know what his conclusion was. * * *

The said Dr. George Price testified:

Have known soldier and have treated him, probably sixteen years before his death. My first treatment was for diarrhea; the attacks were frequent and severe. * * * He was subject to tonsillitis, but aside from the diarrhea I discovered no permanent disease. I examined him once as a member of this board and found no indication of any disease of lungs. I have the record of our examination, and find a rating of sixteen-eightieths for diarrhea and of ten-eightieths for heart trouble. I see no other disability rated. I saw him twice during his last sickness, but he was so nearly gone that I did not prescribe for him; his system was utterly exhausted from the effects of diarrhea, which, in my professional judgment, was the direct cause of death. I examined his lungs but found no disease; his breathing appeared regular; no cough to speak of, and I am sure diarrhea was the cause of his death.

The said Dr. Fay testified:

I do not remember of treating soldier until his last illness. * * * He was very feeble. He had lung trouble; a pronounced case of tuberculosis. There was some diarrhea also. * * * He was too far gone for me to do more than temporarily relieve him, and he soon afterwards died. He was sallow and very much emaciated. * * * The diarrhea was quite severe. * * * There was a considerable cough and a good deal of expectoration. I did not note any other complication except diarrhea.

Witnesses Huff, Green, and Mervine reiterated their above-stated affidavit testimony and were corroborated by John Currie as to prior soundness and service origin of diarrhea, and by Thomas Myers as to its existence immediately after discharge and continuance until death.

The evidence, fully considered, sufficiently shows the prior soundness of the soldier, the contracting in service of chronic diarrhea, its existence at discharge, the soldier's exemption from a subsequent draft two months after discharge, and its continuance until death; also that

it was a large contributing factor in his death, if not the direct death cause. The large preponderance of the evidence shows it to have been the direct and sole cause of death.

Both the soldier's invalid claim and the claim for widow's pension must, therefore, be allowed if the soldier's service was such as to give them a pensionable status.

As to the service rendered, the cases of Randolph M. Manley (5 P. D., 295), Walter Morris (9 P. D., 462), and William Bice (9 P. D., 21) are decisive, under Instructions (11 P. D., 12).

In the said case of William Bice the standing of this said Forty-sixth Regiment was in question, and it was held that the—

Pennsylvania Emergency Militia, while serving in the Army of the United States, under command of United States officers, in response to the call of the President, were a part of that Army while so serving, and are, for that time and as regards the character of the service, brought within the scope of the first subdivision of section 4693 Revised Statutes. * * *

Moreover, the soldier's service has been recognized by the Government in paying for one month and nineteen days of such service.

In view of the foregoing, the actions appealed from are both reversed and the papers are herewith returned for further adjudication of the case in accordance with the views herein expressed.

FEE—FEE AGREEMENTS—ACT OF JANUARY 5, 1893.

WILLIAM H. JONES (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

1. The fourth proviso to the pension appropriation act of March 3, 1891, has no application to the amount of fee to be allowed in claims under the act of January 5, 1893, as they are not claims for increase on account of increase of the disability on account of which pension has been allowed.
2. The decision in the case of Daniel Hauenstein (7 P. D., 256) is overruled.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 20, 1902.

Milo B. Stevens & Co., of Washington, D. C., filed a motion to reconsider the decision of the Department of December 16, 1901, affirming the action of the Bureau in the matter of fee on the issue of May 13, 1901, in the above-entitled claim for increase of pension under the act of January 5, 1893.

The claimant, William H. Jones, was in receipt of pension at \$8 per month, under the act of January 29, 1887, when, in his behalf, on January 24, 1893, George E. Lemon, of Washington, D. C., filed a declaration for increase of pension under the act of January 5, 1893. Certificate issued May 13, 1901, to allow the rate of \$12 per month from

May 3, 1901, the date the claim was approved by the board of review. On said issue the appellants, as the successors of Mr. Lemon, were certified a fee of \$2 under the provisions of the fourth proviso to the pension appropriation act of March 3, 1891. On appeal the action of the Bureau was affirmed in accordance with the rule laid down by the Department in the case of Daniel Hauenstein (7 P. D., 256). In that case it was held (syllabus) as follows:

As claims for increase of pension under the act of January 5, 1893, are claims for increase by reason of the disability on account of which pension was originally granted, the fourth proviso of the act of March 3, 1891, reducing attorneys' fees to \$2 is applicable, and no fee in excess of that sum can be paid.

The fourth proviso to the pension appropriation act of March 3, 1891, reads:

Hereafter no agent or attorney shall demand, receive, or be allowed any compensation under existing law exceeding two dollars in any claim for increase of pension on account of the increase of the disability for which the pension has been allowed. * * *

In the Hauenstein case it is stated (page 257) that by the act of January 29, 1887, pension is granted to soldiers who, if otherwise entitled, shall have attained the age of 62 years, or, when under that age, be subject to a disability or dependency equivalent to some cause prescribed by law for the allowance of a pension; that the age of 62 years was intended as an equivalent of disability, and that (page 258) by the act of January 5, 1893, the rate of \$12 per month is granted to such of said soldiers whose disability has increased so as to totally incapacitate the claimant for manual labor. It is further stated that although there are other conditions which must be shown to entitle a pensioner to the benefits of the act of January 5, 1893, yet it remains that there must be an increase of disability for which pension was allowed under the act of January 29, 1887. Therefore, the conclusion is reached that only such fee can be paid as can be allowed for "securing increase of pension on account of increase of the disability for which the pension has been allowed." This view of the law no longer meets with the approval of the Department.

The act of January 5, 1893, provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized to increase the pension of every pensioner who is now on the rolls at \$8 per month, on account of service in the Mexican war, and who is wholly disabled for manual labor and is in such destitute circumstances that \$8 per month are insufficient to provide him the necessities of life, to \$12 per month.

This act is to be construed in *pari materia* with and in the light of the pension laws governing the grant of pensions to the survivors of the Mexican war. (See case of Robert Markwood, 11 P. D., 382, text.) So considered, it is quite manifest that the rate of \$12 per month is not allowed on account of any increase of the conditions of age or disability which entitles a claimant to the rate of \$8 per month,

but is allowed on account of an entirely different and additional condition, viz, that of destitute circumstances, and one that is not a natural sequence or necessary outgrowth of those conditions prescribed for the allowance of the rate of \$8 per month. For instance, a claimant may be much older than 62 years and physically absolutely helpless, and yet be in comfortable circumstances financially; or vice versa, destitute and not incapacitated either by age or physical infirmities. While it is true that a claimant who is entitled to the rate of \$12 per month must also be entitled to the rate of \$8 per month, it does not follow that the former rate is allowed on account of any increase of disability sequential of the disability for which the latter rate is allowed, and, therefore, it is not thought that the fourth proviso to the pension appropriation act of March 3, 1891, has any application as to the amount of fee which can be paid to an attorney for securing an increase of pension under the act of January 5, 1893.

Proceedings to secure such increase constitute a claim for pension, viz, a claim for increase of pension under the provisions of the act of January 5, 1893. The general provisions of the law respecting the amount of fee to be allowed in any claim for pension, unless otherwise provided, is that in all cases the fee shall be \$10 and no more. (See section 4 of the act of July 4, 1884.) By said section it is also provided when a greater sum may be allowed, viz, in such cases as the Commissioner of Pensions is directed to, or may see fit to, recognize fee agreements when filed. But as there is no provision of law directing the Commissioner of Pensions to recognize fee agreements in claims for increase under the provisions of the act of January 5, 1893, a fee in excess of \$10, and not more than \$25, can be certified only in the event that the Commissioner of Pensions may see fit to recognize fee agreements filed in such claims.

Under the practice a fee of only \$2 has been certified in claims for increase of pension under the act of January 5, 1893, in accordance with the rule laid down in the Hauenstein case, *supra*. The present decision is not intended to disturb the adjustment of claims made under the former practice, but is intended to control the future action of the Bureau with respect to the amount of fee to be allowed in such claims. For the foregoing reasons the Hauenstein case, *supra*, is overruled, and this motion is sustained.

HELPLESS MINOR—ACT JUNE 27, 1890—DISABILITY.

FREDDIE J. TOUMINE (HELPLESS MINOR).

The evidence shows that on account of permanent disabilities the minor is unable to perform manual labor and is a charge upon those bound to support him.

Held: That the minor is "permanently helpless" within the meaning of the third section of the act of June 27, 1890, and entitled to a continuance of his pension as such.

*Assistant Secretary F. L. Campbell to the Commissioner of Pensions,
September 30, 1902.*

Jessie F. Toumine, as the guardian of Freddie J. Toumine, a minor child of James F. Toumine, late a private of Company I, Sixtieth Ohio Volunteer Infantry, and a pensioner as such under certificate No. 279833, on August 3, 1897, and February 24, 1899, filed declarations for the continuance of such pension, under the third section of the act of June 27, 1890, on account of the permanent helpless condition of her said ward.

The above applications were rejected by the Bureau June 28, 1899, for the reason that the minor was not shown to be insane, idiotic, or otherwise permanently helpless.

From this rejection claimant filed an appeal July 30, 1900, alleging that such action was contrary to the evidence.

An official examination of claimant, made May 3, 1899, shows the following physical conditions:

Pulse rate, 66, 78, 90; respiration, 24, 24, 26; temperature, 98.6; height, 5 feet; actual weight, 103 pounds; age, 16 years.

Spinal deformity: Cervical vertebra; beginning at about the seventh, they form nearly a right angle with upper dorsal; a decided anterior curvature from these points; a marked antero-posterior curvature from lower dorsal to lower cervical regions. There is also a lateral curvature, including spine to lumbar region. In mid-dorsal region the spine deviates 1½ inches to the right of a perpendicular.

Arms: Both arms are so turned inward that when forearms are flexed the palms of the hands can not be made to face each other. Also the movements of supination and pronation are entirely deficient, due to conditions about elbow joints.

Leg: Left leg is 1 inch shorter than the right one. Left ankle joint almost completely ankylosed, perhaps congenital.

Heart: Area of dullness increased vertically; apex seen and felt in sixth space on nipple line; systolic murmur heard at apex. No œdema, cyanosis, or dyspnea. Auscultation and percussion reveal no abnormal lung sounds.

Mental condition: Present examination shows no idiocy, imbecility, or insanity. Mentally he seems about as other boys of his age, with perhaps a tendency to precocity which, of itself, with its usual accompaniments, bodes no good in later years.

General appearance: Best learned by a study of the photographs herewith attached. He can not use his forearms in pronation or supination. We do not know to what this is due, but it has perhaps grown with his growth. No other disease. No vicious habits.

A former examination of claimant, made in 1897, describes practically the same disabilities as those above found to exist, and in that examination the surgeons stated that the claimant was not able to perform manual labor.

Dr. C. B. Harrison, in his affidavit of July 24, 1897, stated that—

I have been acquainted with said child (minor) for about ten years and that during that time he has been afflicted with posterior spinal curvature in upper dorsal region, distorted wrist and elbow joints, and partial ankylosis of the left ankle joint. He is of a rachitic diathesis, will always be a dwarf, and totally incapacitated for the performance of manual labor.

Dr. J. B. Spencer, in his affidavit filed August 3, 1897, states that—

I have this day (July 21, 1897) examined Freddie J. Toumine and find him suffering from enlargement of the heart and Pott's disease of the spine, causing a bad deformity, and which will render him an invalid and unfit for manual labor to any extent during his lifetime.

In order to obtain the benefit of the third section of the act of June 27, 1890, it is not necessary that a child be insane, idiotic, and permanently helpless, but the existence of either of these disabilities would bring the minor within the purview of the act. It has been held that the measure of helplessness is whether the child is able to perform manual labor and is a charge upon those legally bound to support it.

The evidence of the two physicians, substantiated by that of the examining surgeons, conclusively establishes the fact that this minor is unable to perform manual labor on account of permanent physical disabilities and, considering his age and other circumstances, would undoubtedly be a charge upon those legally bound to support him.

This minor is shown to be permanently helpless within the meaning of the third section of the act of June 27, 1890, and is entitled to a continuance of his pension as such.

The action of the Bureau is reversed and the papers in this case are returned herewith for further adjudication in accordance with this opinion.

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ACCIDENTAL INJURY.

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ACCRUED PENSION.

See also JURISDICTION, 147.

Act March 2, 1895.

1. The act of March 2, 1895, provides that from and after September 28, 1892, if no widow or child survive the pensioner, no payment whatsoever of accrued pension shall be made or allowed except so much as may be necessary to reimburse the person who bore the expense of his last sickness and burial, and expressly repeals the provision of the act of March 1, 1889, under which this claim for accrued pension is made.

William Lake (deceased)..... 405

Act March 13, 1896.

2. The pending invalid claim filed in 1891 was allowed in 1894, which was subsequent to the soldier's disappearance and supposed death in 1893, and the pension was never paid. In 1900 the widow was allowed pension in her own right, under act of June 27, 1890, upon the presumption of soldier's death, after his continued and unexplained absence from his home and family for a period of seven years from date of his disappearance, during which period no intelligence of his existence had been received.
3. The widow is also held to be entitled to such part of soldier's pension as accrued while he was known to be alive, or from the date of the commencement thereof, as adjudicated, to the date of his disappearance, although the exact date of his death is not known.

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See FEE, 5, 29; MARRIAGE, 510; RESTORATION, 114, 316.

AGE.

See also MINORS, 512; MARRIAGE, 468.

1. It appearing that this appellant was over the age of 16 years at the date of the soldier's death, he has no title whatever to pension under the provisions of the third section of the act of June 27, 1890.

George W. Robinson (minor) 511

AID AND ATTENDANCE.

See also DISABILITY, 50; REDUCTION, 244.

Rate.

1. The aid and attendance that appellant requires in putting on a coat or shirt, or in being taken home occasionally when exhausted, is not such as was contemplated by the acts of July 18, 1874, June 16, 1880, March 4, 1890, or July 14, 1892, providing rates of pension in excess of \$30 per month.

Laban W. McInturff..... 77

2. The act of March 3, 1879, as amendatory of the act of June 17, 1878, confers a statutory right to the \$72 rate upon "all soldiers and sailors who have become totally blind from causes occurring in the service of the United States." The act of March 4, 1890, provides that such rate shall be paid to "all soldiers, sailors, and marines who * * * become so totally and permanently helpless from injuries received or disease contracted in the service and line of duty as to require the regular personal aid and attendance of another person:" *Held*, That inasmuch as the facts presented and the evidence adduced in the case at bar not only show that the appellant, who is pensioned at the rate of \$50 per month for "disease of eyes, piles, and disease of heart, result of rheumatism," is, for all practical purposes, totally blind, but that he also both requires and has the regular aid and attendance of another person, by reason of the degree of disability due to such pensioned causes, he is entitled to the \$72 rate under the provisions of each and both of the said acts; from December 13, 1899, the date of the certificate of the first medical examination showing not only entire absence of all useful vision, but total and permanent helplessness as well.

Jacob S. Clark..... 70

3. By reason of gunshot wound of left arm and injury to right groin, received in the service and line of duty, resulting in a tumor weighing 40 pounds, claimant is totally incapacitated for the performance of any manual labor, and requires the aid and attendance of another person to dress and undress a portion of his body, in taking a bath, and, at times, to attend the calls of nature: *Held*, That he is disabled in such a degree as to require the frequent and periodical, though not regular and constant, personal aid and attendance of another person contemplated in the act of July 14, 1892, and is entitled to \$50 per month.
4. The word "require," mentioned in the act of July 14, 1892, should be given its ordinary meaning, which is, "to make necessary" or "to need." Cases cited: *Ira W. Hayford*, 9 P. D., 307; *Harrison B. George*, 263 L. B., 416; *John J. Hill*, 7 P. D., 142; *Edmond O. Beers*, 7 P. D., 113, and *Peter N. F. von Otten-dorfer*, 3 P. D., 341.

William H. Jones..... 215

5. The former decision in this case (12 P. D., 77), holding that "The aid and attendance that appellant requires in putting on a coat or shirt, or in being taken home occasionally when exhausted, is not such as was contemplated by the acts of July 18, 1874, June 16, 1880, March 4, 1890, or July 14, 1892, providing rates of pension in excess of \$30 per month," is adhered to on motion to reconsider.

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See PATHOLOGICAL SEQUENCE, 443.

ATTORNEYS.

See also FEE, 5, 29, 239.

Order No. 60—Material service.

1. The filing of a declaration in a claim for reissue to correct the date of the commencement of increase under the act of January 5, 1893, at any time prior to November 18, 1901, the date of the approval of Order No. 60, is deemed material service and may entitle an attorney in such claim to a fee.
2. The filing of a declaration, motion, or evidence by an attorney in behalf of a claimant, to secure reissue to correct the date of commencement of pension under the act of January 5, 1893, at any time prior to the allowance of such reissue by the Bureau on its own motion, is deemed material service and may entitle such attorney to a fee.

John Benson..... 221

BOUNTY LAND.**Section 2444, R. S.**

1. The validity of a warrant is not affected by the fact that the warrantee was dead at the date of the issue, and the decision in the case of the Heirs of Panter Laws (2 P. D., o. s., 291), and cited in Digest of 1897, page 67, which held that "a warrant issued after the death of the warrantee named therein is void," is hereby overruled.
2. The action appealed from in this case is reversed, the case reopened, and claimant will be afforded an opportunity to prove the loss of the warrant issued to the soldier February 26, 1852.

Sister of Ezekiel Larkins (deceased) 184

BACTERIOLOGY.

See DEATH CAUSE, 342; PATHOLOGICAL SEQUENCE, 118.

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See LINE OF DUTY, 269.

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See PATHOLOGICAL SEQUENCE, 453

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See SERVICE, 351.

COHABITATION.

See DIVORCE, 497.

COMMENCEMENT.

See also DIVISION OF PENSION, 370.

Increase.

1. Appellant was a pensioner under the act of June 27, 1890, at the rate of \$6 per month, when a claim under the general law, filed by him August 22, 1888, was allowed at the rate of \$6 per month from the date of filing the claim, and his name was accordingly dropped from the roll under the act of June 27, 1890, and placed on the roll under the general law. While in receipt of pension under the general law he filed, January 30, 1892, a claim for renewal and increase under the act of June 27, 1890, which was allowed at \$12 per month from the date of the medical examination, February 3, 1895, and his name was dropped from the roll under the general law. He appealed, contending that the increased rate of pension granted him should have commenced from the date of filing his declaration, January 30, 1892. It is held that the claim for renewal of pension under the act of June 27, 1890, and increase, his title to pension under said act not having been denied, was not an original claim under said act and the allowance of the same was a renewal of the pension originally granted, and that the increase of the rate of pension was, under section 4698½ of the Revised Statutes, properly made to commence from the date of the certificate of the medical examination held under the pending claim (citing the cases of George Baltzer, 10 P. D., 37; Timothy L. Carley, 7 P. D., 12, and James J. Durkee, 8 P. D., 152).

Andrew B. Cleveland 17

Act March 30, 1898.

2. In the case of an enlisted man killed by the explosion of the steamship *Maine*, February 15, 1898, his sea pay for one year thereafter can not be paid to his dependent parents under the special act of March 30, 1898, and a pension be allowed his dependent mother for the same year, or for any portion thereof.

Harriet Adams (mother) 428

Special act.

3. The beneficiary under a special act of Congress, if the act does not fix date of commencement, must draw pension from the date of said act.

Fidillar White alias William Johnson..... 49

CONSCRIPTION.

See DISLOYALTY, 45.

CONSTRUCTION OF STATUTES.

See DIVISION OF PENSION, 163.

CONTRACT.

See MARRIAGE AND DIVORCE, 382.

DEAFNESS.

See RATE, 294.

DEATH CAUSE.

See also PATHOLOGICAL SEQUENCE, 425.

Disease of heart—Rheumatism.

1. A physician testified that he had a clear recollection of treating appellant for rheumatism when at home on a furlough in 1863. One neighbor testified it was his understanding, from what the family said when soldier was home on furlough, that he had camp dysentery for one thing, and rheumatism for another. Another neighbor testified that in 1863, when home on furlough, soldier complained of rheumatism and walked lame, and another swears that while in the service and after discharge he frequently heard soldier complain of rheumatism in his legs and body, and noticed at one time in 1863 that he was quite lame, and after discharge he was still apparently suffering and disabled on account of rheumatism. It is held that soldier's death from disease of heart can be accepted as due to rheumatism contracted in the service and line of duty.

Mary D. Ramsey (widow)..... 89

Gangrene—Ulcerations.

2. The soldier was pensioned for disease of the left leg, which was characterized by swelling, eczematous eruptions, and, at times, ulceration. He died from gangrene of this leg, complicated by disease of kidneys. It is held that the pensioned disability can not be ignored as a predisposing cause of the fatal gangrene of the left leg. Whatever may have been the exciting cause, the fact remains that this chronically diseased leg became gangrenous and caused the soldier's death.

Emily Juno (widow)..... 354

Insanity.

3. Claimant's husband's death by suicide, by reason of his insanity first appearing after his enlistment, is deemed to have been contracted in the line of duty, no other cause for his mental derangement appearing from the evidence.

Elizabeth Penman, now Fulmer (as widow)..... 459

Murder.

4. Soldier's death was caused by claimant's voluntary, unlawful, and felonious act, for which she was indicted, tried, and convicted of murder, and was sentenced therefor to imprisonment for life, but was pardoned after serving twelve years.

She was not, therefore, entitled to pension under the third section of the act of June 27, 1890, on account of the death of her husband caused by her own wrongful and unlawful act.

Susan Smith (widow) 180

Tuberculosis.

5. The deceased soldier was pensioned at the rate of \$12 per month for "chronic diarrhea and resulting disease of rectum." He died November 12, 1897, of pulmonary tuberculosis, which, his widow contends, was an indirect result of the said diseased condition of his alimentary canal: *Held*, That inasmuch as the evidence in favor of the bacterial origin of tuberculosis, whether local or general, is now regarded as conclusive, it is necessarily a primary disease, and it is therefore never a pathologic sequel of any other disease, though certain constitutional peculiarities, and some local conditions, especially of the bronchii, are considered by medical authorities to be favorable to the invasion, growth, and proliferation of the tubercle bacillus.
6. That the evidence in the case does not establish the existence at any time of tuberculosis of the bowels, though it is not improbable that such conditions did exist during the last few years of the soldier's life as secondary to the phthisis pulmonalis, as such a sequel is not at all unusual.
7. That the said cause of the soldier's death not having been incident in any way to his military service, his widow has no title to a pension under the general law.

Susan Codner (widow) 342

DECLARATION.

See also DIVISION OF PENSION, 370.

Amendatory.

1. Claimant in his first declaration alleged that while in the service and in line of duty he incurred "injury of right arm while on detail duty as blacksmith." *Held*, That his said allegation is sufficient to include any disability of the right arm incurred in service and in line of duty, including rheumatism.

Nicholas Gill 54

DECREE.

See MARRIAGE AND DIVORCE, 303, 445.

DEFECTIVE VISION.

See INCREASE, 87, 92.

DEPENDENCE.

See REMARRIAGE, 509.

Parents.

1. A dependent parent is not entitled to pension under either section 4707, Revised Statutes, or section 1 of the act of June 27, 1890, if the soldier on whose account pension is claimed left a widow.

Amy Champlin (mother) 24

2. A mother claimant who occupies her own house and has an income of \$20 per month from rents and receives over \$500 per year, the earnings of her husband, is not dependent within the meaning of section 4707 of the Revised Statutes.

Margaret Burke (mother) 129

3. Claimant and her minor son were slaves when said son abandoned his master and mother in 1863, and enlisted two years thereafter, never having in any manner contributed to his said mother's support: *Held*, That as claimant's said son, the

soldier, never contributed to her support, and was not legally bound so to do, she was not dependent upon him for support at the date of his death, and not pensionable as a dependent mother.

Harriet Gray (mother) 131

4. The evidence showing that the applicant is adequately supported from the proceeds of his farm and the contributions of those legally bound to support him, under the laws of Michigan, he is not dependent within the meaning of section 1 of the act of June 27, 1890.

Hiram Collins (father) 361

5. A dependent father has no pensionable status, under section 4707, Revised Statutes, while the mother of the soldier is living.

David Dyer (father) 401

6. The evidence fairly shows the claimant had adequate means of support aside from her own labor and the contributions of persons not legally bound for her support at the date of filing her claim, she having at that date property worth \$5,000, mortgaged for \$2,100, and which appears to have been fairly rentable for at least \$30 a month over and above interest and taxes, besides furnishing her a house in which she lived and kept two boarders, sons, who paid her about \$55 a month: *Held*, As a general rule, that a parent should be chargeable with such productive use of his or her property as it may reasonably and fairly be capable of as a means of support.

Elizabeth Cove (mother) 472

7. The remarriage of a dependant mother subsequent to the passage of the act of June 27, 1890, and prior to the filing of her claim, under section 4707, Revised Statutes, as amended by said act, does not affect her pensionable status, if she is shown to be dependent within the meaning of the law.

Rebecca Burton (mother) 509

Widows.

8. The care and support of an insane widow in a State insane asylum or by other charity is not such "means of support other than her daily labor" as will bar her title to pension under the act in the contemplation thereof. It is held, therefore, that rejection of the claim for that reason was error, and such action is reversed.

Margaret Moran (insane widow) 40

9. The income mentioned in the act of May 9, 1900, is construed to be that which the widow has, at date of filing claim, as a continuing revenue, from year to year, arising from her property or business or from any sources other than her own labor, and an allotment to her from the soldier's estate under a statute giving a widow and children out of such estate "sufficient provisions or other property to support them for twelve months from" the decedent's death is not necessarily a bar to pension under a claim filed by her several months after his death, but is one item, merely, of income to be considered in connection with other facts showing her general income-producing resources at date of filing such claim.

Rachel Warner (widow) 266

DESERTION.

See also DISLOYALTY, 12; DIVISION OF PENSION, 7, 56, 412, 421; SERVICE, 226, 450.

Discharge.

1. It appearing from the official record of this appellant's military service, and from his own sworn statements, that the disabilities on account of which he was formerly pensioned had been contracted during a term of enlistment from

which he had deserted, and from which he had never been discharged, he is not entitled to be restored to the pension roll, for the reason that there is no period from which pension on account thereof could properly be made to commence under the law, and he, having violated and repudiated his said contract of enlistment, has forfeited all right to any benefits that were incident to such enlistment. (John Norton, 9 P. D., 382; Lewis Rankin, 11 P. D., 373.)

Sandford P. alias Peter S. Burke..... 379

Line of duty.

2. At the time of incurring his alleged disabilities in the Seventh Kansas Infantry, claimant is shown to have been a deserter from Company E, First United States Infantry, and he was therefore not in line of duty. (John Norton, 9 P. D., 382; John Sullivan, 10 P. D., 55; Lewis Rankin, 11 P. D., 373.)

Isaac B. Goforth alias Napoleon B. Gordon..... 253

Minors.

3. Claimant having enlisted when he was over 18 years of age, in 1861, and deserted from said service and subsequently reenlisted, has no title to pension under the act in question.

Francis M. Samuels, alias Charles Smith..... 80

DISABILITY.

See also HELPLESS MINOR, 527; INCREASE, 59, 87, 92; PRACTICE, 254.

Aid and Attendance.

1. The claimant is a pensioner at second-grade rating for rheumatism and resulting disease of heart. The claim was rejected on the ground that the present helpless condition is due to senility rather than to pensioned causes: *Held*, That the pensioned disabilities can not be ignored as the probable causes of the cerebral hemorrhage to which the existing left hemiplegia is due. The claimant is entitled to the benefit of any reasonable doubt as to whether senile changes were or were not the most potent cause of the cerebral hemorrhage. Action reversed.

Gideon Ganoe 50

Support.

2. As appellant is disabled from all causes of a permanent character, not due to vicious habits, in a degree rendering him unable to earn a full support by manual labor, he is entitled to a rating under section 2 of the act of June 27, 1890.

Edward L. Hobart..... 319

Amputation.

3. The question as to whether there is total disability in a limb, as mentioned in the act of August 4, 1886, is one requiring evidence to establish and judgment to determine, and therefore such a disability is not a permanent specific disability within the meaning of section 4698½ of the Revised Statutes, and an increased rate of pension on account of such a nonspecific disability must commence from the date of the certificate of the medical examination had under a claim for increase instead of from the date of the passage of the act of August 4, 1886.

Henry Wheeler 477

DISBANDMENT.

See SERVICE, 407.

DISCHARGE.

See DESERTION, 379; SERVICE, 273, 450, 466.

DISEASE OF HEART.

See DEATH CAUSE, 89; PATHOLOGICAL SEQUENCE, 491.

DISLOYALTY.**Conscription.**

1. The claimant has a record of service in the Confederate Army extending over several months. He was afterwards a prisoner of war at Rock Island, Ill., where he enlisted in the Union Army. There is nothing in the record to show that the service in the Confederate Army was not voluntary and the presumption that it was so is not overcome by the evidence filed by the claimant showing that he was a Union man in sentiment and refused to enter the Confederate service until he was conscripted. Rejection of the claim was proper.

William Truelove..... 45

Duress.

2. The evidence in this case shows that appellant and others, who were in hiding to avoid conscription in the rebel army, were Union men; that in the spring of 1863 one Captain Love, of the Confederate States Army, came into that community with some men and threatened to burn the homes of Union families unless those men came in and went into the Confederate Army; that to escape was then impossible, and they all came in and joined said Love's command, but were never sworn into the Confederate service nor did military duty; that appellant left said company within six weeks thereafter and before its organization was completed, and joined the Union Army and served therein until 1865: *Held*, That these facts do not establish a voluntary aiding and abetting of the rebellion against the authority of the United States within the meaning of section 4716 of the Revised Statutes.

John W. Payne 12

DIVISION OF PENSION.

See also JURISDICTION, 263; PRACTICE, 410.

Commencement.

1. Appellant filed her claim under the act of March 3, 1899, on April 11, 1901, and it having been established that pensioner was at that date an inmate of a State Home, and had been an inmate of such Home from the date of the quarterly payment of his pension preceding the filing of such claim, March 4, 1901, and continuously since, and had also deserted said claimant over six months prior to said quarterly payment and subsequent to the passage of said act, and had been in such desertion continuously since, on the allowance of her claim the payment of one-half of such pension should have commenced from said last quarterly payment, March 4, 1901, under the decision in the case of *Cooper v. Cooper* (12 P. D., 163).
2. The practice of the Bureau of Pensions in paying the wife of a pensioner, under the act of March 3, 1899, one-half only of so much of the pension as remains in the hands of the pension agent on the quarterly payment day subsequent to the allowance of the claim is abrogated.
3. The filing of a valid declaration for division of pension under the act of March 3, 1899, is notice to the Government of the claim for one-half of the pension that may be due or accruing on said date, and further payment of one-half the pension becoming due to the pensioner should be suspended until the adjudication

of the claim, and for the period thereafter allowed for appeal, unless an appeal is waived.

4. A declaration under the act of March 3, 1899, must be accompanied by proof in support thereof sufficient to establish a prima facie case under the law.
5. The Bureau of Pensions will promptly notify the claimant and pensioner of the action taken in a claim filed under the act of March 3, 1899, and that thirty days from the receipt of such notice will be allowed in which to file an appeal, during which period payment of one-half of the pension involved will be suspended, unless an appeal is waived.
6. The face brief should show the date on which payment to the wife of one-half of her husband's pension commenced.

Adams v. Adams..... 370

Construction of act March 3, 1899.

7. The portion of soldier's pension forfeited to his wife by reason of his desertion, under the first proviso of the act of March 3, 1899, is one-half the pension "due or to become due" him after his statutory desertion of six months subsequent to the passage of the act and during the continuance of said desertion. It is only the pension owing or accruing during the period of statutory desertion that is to be divided.

Cooper v. Cooper..... 163

Desertion.

8. As the evidence in the case fails to show that pensioner deserted his wife, within the meaning of the act of March 3, 1899, the payment to her of one-half of his pension was error.

Harris v. Harris..... 7

9. Claimant at the date of filing her claim for one-half of soldier's pension under the act of March 3, 1899, was living separate and apart from her husband pursuant to a mutual agreement for separation executed March 10, 1897, which agreement was in full force and effect. She was, therefore, not in position to charge her husband with desertion, as his absence from her is with her consent and in accordance with her express agreement. *Stewart on Marriage and Divorce*, par. 256; 9 Am. and Ency. (2d ed., 767); *Stoffer v. Stoffer* (50 Mich., 491).

Fleagle v. Fleagle..... 561

10. The fact that claimant, since the allowance of her claim for division of her husband's pension, refused to live with him will not justify a reversal of the Bureau action.

Smith v. Smith..... 421

11. The evidence in this case fails to satisfactorily show that pensioner's absence from claimant since March 3, 1899, was in opposition to her wishes or against her consent.

12. Separation by mutual consent does not constitute desertion (*Rothery v. Rothery*, 11 P. D., 77 and 377). Consent may be inferred from conduct (*Ingersoll v. Ingersoll*, 49 Pa. St., 249).

Coats v. Coats..... 507

Articles of Separation.

13. Claimant, at the date of filing her claim for one-half of soldier's pension under the act of March 3, 1899, was living separate and apart from her husband, pursuant to a mutual agreement for separation executed December 17, 1898, which agreement was in full force and effect. She was, therefore, not in position to charge her husband with desertion, as his absence from her was with her consent and in accordance with her express agreement. *Stewart on Marriage and*

Divorce, paragraph 256; 9 Am. and Eng. Ency. L. (2d ed.), 767; *Stoffer v. Stoffer* (50 Mich., 491); *Fleagle v. Fleagle* (12 P. D., 67).

Crawford v. Crawford..... 364

Domicile.

14. The refusal of the wife to follow her husband, who had deserted her, to another State and leave her home upon the mere offer of her husband to provide a home for her does not necessarily constitute her the deserter. *Schouler's Domestic Relations* (3d ed., par. 38); *Gleason v. Gleason* (4 Wis., 64); *Bishop v. Bishop* (30 Pa. St., 412); *Hardenberger v. Hardenberger* (14 Cal., 654); *Powell v. Powell* (29 Vt., 148); *Phelan v. Phelan* (35 Ill. App., 511, and 135 Ill., 445).

15. The desertion of the husband entitled the wife to her own domicile. *Moffatt v. Moffatt* (5 Cal., 281).

Pierce v. Pierce..... 412

Jurisdiction.

16. Claimant's declaration under the act of March 3, 1899, alleging desertion by the pensioner, her husband, and claiming one-half of his pension, having been filed April 22, 1899, less than six months after the passage of said act, conferred no jurisdiction on the Commissioner to pass on the facts alleged in such declaration, the action holding that appellant was not a person of good moral character and rejecting her claim is reversed. See cases of *Rothery v. Rothery* (11 P. D., 77 and 377) and *Richards v. Richards* (Ibid., 90).

Millard v. Millard..... 263

17. A wife who owns a house and lot valued at \$1,150, a lot valued at \$65, household furniture valued at \$50, has \$150 in bank, and rents a house for which she pays \$600 per annum, and by subleasing of rooms supports herself, is not in necessitous circumstances within the provisions of the act of March 3, 1899, and is not entitled to one-half her husband's pension of \$17 per month, he being without other means of support than his daily labor.

18. The declaration filed by claimant July 17, 1899, for division of her husband's pension based on desertion was void and conferred no jurisdiction on the Commissioner of Pensions to suspend or withhold pension or any portion thereof, or to pass upon the question of desertion, as the desertion named in the act of March 3, 1899, could not exist until after the expiration of six months from the passage of said act. *Rothery v. Rothery* (11 P. D., 77 and 377); *Richards v. Richards* (ibid., 90); *Henry M. Rothery* (ibid., 255), and *Millard v. Millard* (12 P. D., 262).

Fisher v. Fisher..... 336

Residence in Soldiers' Home.

19. Pensioner was shown to have been an inmate of a State home for soldiers or sailors for over two months after the filing of an application by his wife for division of his pension under the second proviso of the act of March 3, 1899. The rejection of her said claim on the ground that the pensioner was not, at the date of the adjudication, an inmate of a soldiers' home, was, therefore error.

Filones v. Filones..... 237

20. Where a wife bases her application for division of her husband's pension on the sole ground that he is an inmate of a State home for soldiers or sailors, the question of desertion is not involved, and the rejection of such a claim, under the act of March 3, 1899, on the ground that "desertion complained of has not existed for six months" is error.

Medley v. Medley..... 490

DIVORCE.

See also MARRIAGE IN NEW YORK, 303.

Cohabitation after.

1. The evidence shows that the claimant applied for a divorce from the soldier, and a legal decree was subsequently issued by the Mason County circuit court, in the State of Kentucky, on January 13, 1883. The evidence further shows that she continued to cohabit and live with the soldier as his wife, in Maysville, Ky., up to the date of his death: *Held*, That, as she was once legally divorced, and common-law marriages are not valid in the State of Kentucky, she is not the legal widow of the soldier, and therefore not entitled to pension under the act of June 27, 1890. See case of Mary Munsel (9 P. D., 30).

Letitia Glover (widow) 497

DOMICILE.

See DIVISION OF PENSION, ACT OF MARCH 3, 1899, 412.

DRAFTED MAN AND SUBSTITUTE.

See SERVICE, 273.

DURESS.

See DISLOYALTY, 12; MARRIAGE AND DIVORCE, 434.

ELECTION.

See RATE, 331.

ENLISTMENT.

See SERVICE, 137, 500.

ERYSIPELAS.

See PATHOLOGICAL SEQUENCE, 491.

EVIDENCE.

See also DEATH CAUSE, 89, 459; DEPENDENT RELATIVES, 129, 361; DISLOYALTY, 45; LEGITIMACY, 102; MARRIAGE, 32, 134, 182, 278, 296, 312, 333, 348, 417, 434, 514, 517; MINORS, 512; PATHOLOGICAL SEQUENCE, 425; REIMBURSEMENT, 394; RES JUDICATE, 179.

Presumption of unsoundness.

1. The fact that claimant had an attack of rheumatism while a soldier in the Mexican war does not furnish any just ground for concluding that he had said disease at the date of his enlistment in 1862, it having first appeared during his last service in 1864.

Andrew Campbell 155

2. A statement in a certificate of discharge that the disabling cause on account of which the soldier was discharged existed prior to enlistment outweighs and rebuts the presumption of prior soundness (Isaac Williamson, 1 P. D., 7).

C. R. Beardslee alias Charles P. Barclay 264

Presumption of death.

3. As appellant's husband (the soldier) had not been absent unheard of for seven years next preceding the filing of her claim for pension, and no evidence tending to show his death prior thereto having been furnished, she can not be held to be said soldier's widow and entitled to pension on account of his service and death.

Mary L. Reese (alleged widow) 111

4. The fact that claimant's husband deserted her in 1849, of itself, does not raise the presumption that he was dead in 1861, when she married soldier (Rosie Wilson, 6 P. D., 133; Pythia Ann Sullivan, 7 P. D., 512; Mary A. Warburton, 7 P. D., 49; and Helen L. Pepper, 9 P. D., 500); but the fact of claimant's marriage to the soldier in 1860 or 1861, under the belief that her first husband was dead, her continued cohabitation with him as his wife until his death, thirty-seven or thirty-eight years thereafter, the rearing of a family of children recognized by the soldier and herself as their legitimate children, and the fact the first husband was never heard of since 1849, are circumstances from which it may be inferred that said first husband was dead when claimant married soldier in 1860 or 1861; and that the presumption, from the facts, of innocence and morality outweigh the presumption of the continuance of the life of said first husband, Rider, and claimant's marriage to the soldier was legal. The case of Margaret J. Anderson (4 P. D., 67) is overruled.

Margarette E. Harnden (widow) 278

FEE.

Act March 3, 1901.

1. An attorney can not receive any compensation for the prosecution of a claim for pension under the provisions of the act of March 3, 1901, either directly or indirectly from the claimant, or from any other person.

Francis A. Patterson (widow) 29

2. The act of March 3, 1901, in specific language prohibits any person from receiving compensation for services in making application under its provisions; and the words "making application" signify not only the filing of a declaration for pension, but also the filing of evidence showing title to pension.
3. As the question as to whether an attorney or agent may in such a case collect a fee from the claimant is not properly before the Department, the appeal, in so far as the same relates to this point, is dismissed.

Francis A. Patterson (widow of Osler) 5

Act January 5, 1893.

4. The fourth proviso to the pension appropriation act of March 3, 1891, has no application to the amount of fee to be allowed in claims under the act of January 5, 1893, as they are not claims for increase on account of increase of the disability on account of which pension has been allowed.
5. The decision in the case of Daniel Hauenstein (7 P. D., 256) is overruled.

William H. Jones 525

Forfeiture.

6. The fact that an attorney makes contention for a fee for his services in a claim for pension estops him from denying that he has received notice of the allowance of the claim, and that his title to the fee has been denied by the Bureau; and where subsequently to making such contention he acquiesces in the adverse action of the Bureau for one year—that is, fails to enter an appeal to this Department—he thereby forfeits whatever title he may have had to the fee.
7. When an attorney who contends for a fee on the original issue in a claim under the general law subsequently to said issue files in behalf of the applicant a declaration for "additional pension" in which is recited the fact that the applicant is in receipt of pension under the general law, it is presumed that said attorney has received notice of the allowance of the original claim; and where under the foregoing conditions he acquiesces for one year from the date of filing said declaration in the adverse action of the Bureau in refusing to certify to him a fee on the original issue—that is, fails to enter an appeal to this Department within a year—he thereby forfeits whatever title he may have had to the fee.

James Marshall 239

Refundment.

8. As but one fee can be certified on each issue to allow pension in a claim where such fee was erroneously certified and paid to an attorney and he refuses to refund the same, the Commissioner can not certify another fee to the attorney entitled to the one so paid, as there is no fund from which such fee may be paid.

Harvey Harrington..... 109

9. Where a pension has been fraudulently obtained, the attorney who prosecuted the claim, without knowledge of the fraud, can not be required to refund the fee paid him for his services in securing the pension allowed. The case of Elizabeth Striggon (8 P. D., 12) is overruled.

Thomas Webster..... 441

FORFEITURE.

See FEE, 239.

FRAUD AND MISTAKE.

See also FEE, 441; REIMBURSEMENT, 394; RES ADJUDICATE, 179.

Reimbursement.

1. The evidence showing that the appellant made a fraudulent application in 1866, upon which pension was allowed and paid, it is immaterial whether such pension was actually received by her or was (as is alleged) appropriated by her attorney. In either event the Government may reimburse itself by withholding current pension due her.

Annie Cooke (widow)..... 116

FUND.

See FEE, 109.

GANGRENE.

See DEATH CAUSE, 354.

GUARDIANSHIP.

See also JURISDICTION, 147.

1. Soldier died August 5, 1884, leaving the appellant, his widow, and a minor child, William P., under 16 years of age. The widow, mother of said minor, remarried December 25, 1884. Said minor was born July 29, 1883, and has resided with his uncle, David H. Hall, continuously since he was 16 months old, who was duly appointed his guardian by the district court in the State of Iowa September 5, 1890. October 4, 1890, said guardian filed a claim for pension as such guardian under the act of June 27, 1890, and appellant also filed a claim for pension under said act as mother of said minor January 31, 1891, and was subsequently, September 7, 1891, appointed guardian of said minor by the probate court of Hubbard County, Minn. On January 31, 1899, her said claim was rejected on the following ground: "That the claim for the minor under the act of June 27, 1890, has this day been allowed, and payment ordered to be made to David H. Hall, the guardian, who acquired authority anterior to the filing of this claim, or the appointment of Calista A. Stombaugh as guardian." It is held that Hall, having been recognized as a fit person to act as agent of the Government to receive and disburse the money of his ward, and he having accepted the agency thus imposed and nothing appearing in the record showing that he has broken

its terms, the Bureau action rejecting appellant's claim for recognition in the claim was without error. Any contest over the right of possession of the minor or his property must be relegated to the local courts for decision.

Minor of David T. Hall 1

HELPLESS MINOR.

Disability.

1. This child, although sound in body, being so deficient mentally that he can not learn, has no memory, will work only under constant direct personal oversight, and will not be employed by anyone, even for his board only, is helpless within the meaning of the law.

Minor of Myers Horn 365

2. The evidence shows that on account of permanent disabilities the minor is unable to perform manual labor and is a charge upon those bound to support him: *Held*, That the minor is "permanently helpless" within the meaning of the third section of the act of June 27, 1890, and entitled to a continuance of his pension as such.

Freddie J. Toumine (helpless minor) 527

HEMIPLEGIA.

See DISABILITY, 50.

HUSBAND AND WIFE.

See DIVORCE, 497.

IDENTITY.

1. Appellant filed her claim for pension under the act of June 27, 1890, as the widow of one George Washington, late of Carlisle, Pa., who she alleged served in Company E, Fifth Massachusetts Volunteer Cavalry. On April 3, 1894, one George Washington, residing in Boston, applied for a pension as the person who served in said company and regiment, and his claim was admitted after a special examination, November 9, 1896, appellant's claim having been rejected September 8, 1896, on the ground that the evidence failed to show that her deceased husband was the person who served in said company. Subsequently she filed additional testimony to establish the identity of her late husband, but the former rejection of her claim was adhered to. It appears that appellant was in possession of the discharge certificate of the George Washington who rendered the service in said organization, when she filed her claim for pension, and it appeared that the same was in the possession of her late husband as early as 1874, but it appeared just as clear that it had at one time been in the hands of the George Washington of Boston, and the personal description therein was unquestionably that of the latter. In view of the fact that a large number of witnesses of good reputation, including comrades, one of whom was a white lieutenant in said company, testified with the pensioner before them, that he was the identical George Washington who rendered the service in said organization, and the superior standing and character of the witnesses testifying in behalf of the pensioner, as compared with those testifying for appellant, it is held that the evidence does not show that her deceased husband was the soldier who rendered the service as George Washington in Company E. Fifth Massachusetts Cavalry, and her claim for pension was properly rejected.

Mary E. Washington (widow) 228

ILLINOIS, LAWS OF.

See MARRIAGE AND DIVORCE, 326, 481.

IMPEDIMENT.

See MARRIAGE, 106, 134, 258, 292, 306, 312, 326, 333, 340, 348, 417, 481, 505.

INCOME.

See DEPENDENT PARENTS, 129.

INCREASE.

See also COMMENCEMENT, 17; NOTICE, 21; RATE, 294, 331; RERATING, 212.

Defective vision.

1. Appellant is adequately pensioned at third grade for the degree of disability shown to result from the loss of left eye, affecting sight of right eye, from gunshot wound, it appearing that he has one-tenth vision remaining in right eye, which would enable him to perform some coarse manual labor not requiring much acuity of vision, and not, therefore, incapacitating for all manual labor, entitling him to the second-grade rate.

William Moore 87

2. In the case at bar, a pension at the rate of \$17 per month is held by the Bureau to be adequate to the degree of disability resulting from total blindness of one eye and loss of nine-tenths vision in the other eye from corneal opacity. In the case of William Moore (12 P. D., 87), considered by the Department upon appeal November 30, 1901, the Bureau had allowed the third-grade rate (\$24 per month) for loss of one eye from traumatism, and loss of nine-tenths vision in the other eye from optic atrophy resulting from said injury.
3. The inequality in the rates allowed by the Bureau in these two cases for practically the same degree of inability to perform manual labor, of each pensioner, by reason of poor vision, demonstrates the advisability of adopting some method by which a more equable adjustment of rates in cases of ocular injuries can be made.
4. In the judgment of the Department the rules laid down, the formulas evolved, and the tables prepared showing the relative values of the different defects of vision, by Würdemann and Magnus in their joint work on "The economic valuation of vision," furnish a medium or working basis for a more uniform arrangement of rates in such class of cases.
5. Accepting their maximum and minimum limits, respectively, of the range of visual acuity necessary as a condition of success in the performance of manual labor, namely, 0.50 (one-half) to 0.05 (one-twentieth) of the full scientific standard, as being both practical and approximately correct, though not controlling, it is quite evident that a visual acuity that is limited to one-tenth of normal, and exists in but one eye (the conditions shown in this case) is a very low grade of vision.
6. *Held:* That the degree of disability resulting from the amount of damage to the visual acuity of the appellant in this case is fully equivalent to the loss of a hand or foot for purposes of manual labor, and warrants the allowance of the third-grade rate (the rate allowed in the case cited above, for an equivalent though not identical cause of disability).

John T. Watson 92

Paralysis.

7. The basic principle upon which claims for straight increase under the general law are adjudicated involves, primarily, the question as to whether or not the degree of disability due to pensioned cause or causes, per se, has increased to such an extent as to warrant the allowance of a higher rate of pension, and secondly, the question as to whether or not some sequence has arisen which increases the degree of disability, and consequently warrants an increase in rate.
8. In the case at bar the essential feature of this principle appears to have been ignored in the adjudication of the pensioner's claims for increase filed April 16, 1896, and June 12, 1897, respectively, each of which was rejected principally upon the ground that the paralysis of his left side could not be accepted as a result of the disease of spine for which he is pensioned.
9. In the judgment of the Department, the refusal on the part of the Bureau to accept the paralysis of the claimant's left side as a result of the disease of spine for which he is pensioned was justified by the history of the case furnished by the claimant himself; but it is held that the refusal to allow an increase in rate from third to second grade for disease of spine alone, under each and both of said claims, was error, as it was clearly shown at the medical examinations made pursuant to such claims that he was unable to perform any manual labor by reason of said pensioned cause.
10. All adverse actions in the said claims, both of the Department and the Bureau, are rescinded and set aside.

Thomas C. Johnson 59

INCURRENCE.

See LINE OF DUTY, 464.

INSANITY.

See DEATH CAUSE, 459; REDUCTION, 244.

JURISDICTION.

See DIVISION OF PENSION, 336; FEE, 109.

Guardianship.

1. The Commissioner of Pensions is without authority, in the absence of legislation by Congress giving him power so to do, to suspend the quarterly payments of pension to the duly appointed and qualified guardian or committee of an insane pensioner solely upon the ground that funds have accumulated in the hands of such guardian or committee in excess of the needs of the insane pensioner, and when there is no charge or proof of any maladministration, embezzlement, or unlawful conversion to his own use by such guardian or committee of the pension money in his hands belonging to his ward.
2. The decision of this Department of May 22, 1901 (11 P. D., 351), is hereby modified and overruled.

Guardian of George J. Brick (insane) 147

Practice.

3. Claimant's declaration under the act of March 3, 1899, alleging desertion by the pensioner, her husband, and claiming one-half of his pension, having been filed April 22, 1899, less than six months after the passage of said act, conferred no jurisdiction on the Commissioner to pass on the facts alleged in such declaration, the action holding that appellant was not a person of good moral

character and rejecting her claim is reversed. See cases of *Rothery v. Rothery* (11 P. D., 77 and 377), and *Richards v. Richards* (Id., 90).

Millard v. Millard 263

JOINT RESOLUTION, JULY 1, 1902.

See SERVICE, 450.

KENTUCKY, LAWS OF.

See MARRIAGE AND DIVORCE, 292, 439.

LEGITIMACY.

Evidence.

1. The evidence shows that the mother of this claimant married one Little in 1877, in Pike County, Ark., and in the same year removed to Hempstead County, in the same State; that said mother returned to her relatives and friends in Pike County, in 1879, and reported that said husband was dead, bringing an infant son by said marriage with her; that in 1883 she married claimant's father, Thomas J. Fox (now deceased), who survived her; that it was understood and believed by her relatives, friends, and neighbors that said former husband died in 1879, said son by said former husband testifying, also, that he resided with his mother until her death in 1885, and was always told that his father died while he was a small child. It is held, in harmony with the cases of *Kelly's heirs v. McGuire et al.* (15 Ark., 605), and *Wilson v. Brownlee* (24 Ark., 586), that declarations by members and relatives of the family, or general repute in the family, are good evidence to establish death, heirship, and the like, though disconnected with any question of pedigree; and in this case satisfactorily establishes that claimant's mother's first husband died prior to her marriage to her father, Fox, and that said marriage was legal, and she is the legitimate daughter of said soldier.

Cora B. Fox (minor) 102

LIMITATION.

1. The only widow who is required by the fourth proviso of the act of March 3, 1899, to have lived and cohabited with her husband continuously from the date of their marriage to the date of his death, in order to establish her pensionable status, is one whose marriage occurred on or subsequent to the passage of the act and subsequent to his last military or naval service, he not having served in the war between the United States and the Kingdom of Spain. Claimant having married soldier June 17, 1899, and lived and cohabited with him continuously from the date of the marriage to the date of his death, January 3, 1900, the rejection of her claim on the ground that she married the soldier subsequent to the passage of said act was error.

Henrietta Briggs (widow) 479

LINE OF DUTY.

See also DESERTION, 253; ORIGIN OF DISABILITY, 298.

Accidental injury.

1. The claimant being absent from his camp, by permission to visit a nearby town, in pursuit of his own pleasure and recreation, and being injured in the right eye by an accidental blow from a fireball shot from a roman candle, during Christmas festivities in the town, was not in the line of duty, and is not entitled to pension on account of such injury so incurred.

James D. Silman 431

Pass to visit.

2. The evidence showing that the injury for which the claimant seeks pension was incurred while he was absent from his proper command by verbal permission of this captain, for the purpose of visiting his family, and that at time of said injury he was not performing any military service, but was running from some rebel cavalry, having joined, in his flight, some other troops, with whom he remained several days hiding out in the woods, it is held that his injury was not incurred in the line of duty.

Robert A. Smith..... 142

Undergoing punishment.

3. The claimant being at time of incurrence of injuries in confinement undergoing sentence of a court-martial, he was not in line of duty for pensionable purposes.

John J. Macentee..... 464

Wood alcohol—Poison.

4. The expert evidence filed in the case since the former decision in the same (10 P. D., 376) was rendered emphasized the conclusions reached in said former decision that claimant's loss of vision was due to wood alcohol poisoning, not due to the service in line of duty, and said decision is adhered to, and the motion to reconsider and set the same aside is overruled.

Joseph E. Hendrickson..... 269

LOST WARRANT.

See BOUNTY LAND, 184.

LOUISIANA, LAWS OF.

See MARRIAGE AND DIVORCE, 382.

"MAINE," THE.

See COMMENCEMENT, 428.

MALARIAL POISONING.

See PATHOLOGICAL SEQUENCE, 422, 486.

MARRIAGE.

See also DIVORCE, 497; LIMITATION, 479.

Burden of proof.

1. Appellant was married to the soldier in legal form in 1882, and lived with him in the relation of husband and wife from the date of such marriage to the date of his death in 1896, leaving three children the result of said union. Appellant was never married prior to her marriage to soldier, and no evidence appears in the case tending to show that soldier was ever previously married, but all the evidence in the case shows that he was known only as a single man or bachelor. It is held that the marriage thus shown was subject to attack only on clear and satisfactory evidence of a want of capacity of the husband, which in this case has not been shown, and claimant's marriage to soldier is shown to have been legal, and she is his widow.

Henrietta Kirchner (widow)..... 296

Duress.

2. The evidence shows that the claimant was lawfully married to one James Hol-
leran (who is still living) prior to her marriage to the soldier, and fails to
show that said prior marriage was ever legally annulled or dissolved. It is
therefore held that her marriage to the soldier was invalid.
Ellen Derening (widow) 434

Divorce—Act March 3, 1901.

3. It appearing from the evidence in this case, and from this appellant's own admis-
sion, that she was divorced from her second husband, Thomas E. Umberger,
upon his application, she has no title whatever, under the provisions of the
act of March 3, 1901, to restoration of the pension she formerly received as the
widow of the deceased soldier, David D. Palmer.
Annie M. Palmer, now Umberger (widow) 510

Impediment.

4. The deceased soldier was first lawfully married in 1857, in Mifflin County, Pa.,
to one Amelia Ryan, with whom he lived as his wife until 1866, when he
deserted her and went to Platte County, Mo., where he married one Elmyra
Burns, in August, 1867. He deserted this second wife, Elmyra, in a few
months, and there is no proof that he ever lived with her, or acknowledged
her as his wife afterwards. The evidence shows that the soldier was never
divorced from his first wife, Amelia, who is shown to have died in 1878. He
married the appellant, Sarah Waddel, in Calhoun County, Ill., in 1887, nine
years after the death of the first wife, Amelia, and lived with her as his wife
until his death in 1894: *Held*, That the second marriage of the soldier to
Elmyra, while the first wife was living and undivorced, was illegal and abso-
lutely void, never became a lawful union, and constituted no bar or imped-
iment to his marriage to this appellant in 1887, after the dissolution of his first,
and only lawful prior marriage by the death of Amelia, and that the appellant
is shown to have been the lawful wife of the soldier, and should be accepted
as his widow for pensionable purposes.
Sarah Sanford (widow) 106
5. It appearing from the evidence in this case that at the date of the marriage of this
appellant to the deceased soldier he had another lawful wife living and undi-
vorced, her marriage to him was illegal and void under the laws of the State of
New York, where it was consummated and where the parties resided; and since
it also appears that the appellant had no knowledge of the existence of the
impediment to her lawful marriage with the soldier until after his death, and
no change in the relationship sustained by said parties to each other is shown
after the removal of the impediment to their lawful union by the death of the
first wife, no legal marriage is established between the appellant and the
soldier, and she is not his pensionable widow.
Caroline Wagner (alleged widow) 134
6. Claimant married Harrison Conklin in 1862, and he died in the service in 1864.
John Conklin married Jane Conklin in 1864, and while she was living and
undivorced married the claimant herein in 1866. The testimony shows claim-
ant to have had no knowledge of the first marriage of John until after his
death in 1895, having lived with said John as his wife for nearly thirty years,
and having reared a family of four children: *Held*, Claimant is the widow of
Harrison Conklin, and is entirely free and blameless from any charge of open
and notorious adulterous cohabitation with John Conklin.
7. The act of August 7, 1882, is founded upon a condition implying vitiated morals
and a lack of chastity, and does not reach those whose matrimonial relations

are illegal from an abstract technical standpoint only and are not tainted with moral turpitude.

Watie D. Conklin (widow) 259

8. The only testimony as to claimant's first marriage and as to that husband's death being her own statement, which shows also that his death was prior to her second marriage, she appearing to be a woman of good reputation, and no further testimony appearing to be procurable, she is held to have satisfactorily established her capacity to remarry. Her second marriage is shown of record; also a third, to the soldier, three years later, and subsequent to the reported death in England of her second husband, but the only testimony as to the death of her second husband is her own statement, none other appearing to be procurable. She and soldier cohabited as husband and wife until his death, nearly thirty years after their marriage, with no further news of her second husband: *Held*, Assuming her formal marriage to the soldier was invalid and void, the prior death of her second husband not being satisfactorily established by proof, that the latter's death may be presumed under the general rule as to presumption of death, and that there was a valid common-law marriage subsequent to the seven-year period mentioned in said rule.

Elizabeth Adams (widow) 312

9. The only evidence of a prior marriage of claimant or soldier is the statement of the former coupled with the statement that the first husband and wife died years before the second marriage, but that it was impossible for her at that late date to furnish further evidence as to that fact: *Held*, That claimant having proved the fact of her marriage to the soldier according to the laws of Texas, where said marriage was celebrated and where the parties resided at the time the right to pension accrued, and having cohabited with soldier as his wife from the date of said marriage to the date of his death, ten years thereafter, her pensionable status was established, as the mere presumption of life of a prior husband or wife can not prevail against the presumption of the innocence of the parties who enter the marriage relation according to legal forms. (*Esther A. Palmer*, 11 P. D., 320.)

Rebecca J. Fisher (widow) 417

10. In this case soldier married claimant while he had an undivorced wife living, of which claimant was ignorant. Three months after such marriage soldier procured a decree of divorce from his first wife, evidencing his desire to remove any impediment to such marriage: *Held*, That these facts warrant a special examination to determine the facts as to when soldier filed his bill for divorce, the date of the default decree, and all facts bearing on the intention of the parties to live in the relation of husband and wife subsequent to the removal of the impediment to their legal marriage, distinguishing this case from that of *Cartwright et al. v. McGown* (121 Ill., 388).

Eliza B. Wilson (widow) 481

11. In a case where the evidence establishes the marriage of claimant to the soldier, and there is no evidence that the parties were incapacitated for marriage at its date other than the soldier's own statement that he had been previously married, in which he also said that his former wife had died before his marriage to claimant, the marriage is not successfully attacked nor its validity destroyed.

Selia Ambers (widow) 333

12. Claimant Alice married the within-named soldier in 1863, and he deserted her about the year 1868. She subsequently attempted to contract two other marriages, and the soldier died, after said attempts, in the year 1894: *Held*, Claimant's subsequent marriages were void ab initio for the reason that she had a living and undivorced husband at the dates on which she attempted to

contract said marriages. She is now the widow of soldier. Claimant Ellen married soldier in the year 1869, and he died in the year 1894. Soldier at the date of his marriage with claimant had a living undivorced wife, and said wife is now living: *Held*, Claimant is not the widow of the soldier in question.

Alice and Ellen Franklin (as widows) 505

Indians under act August 7, 1882.

13. Section 4705 of the Revised Statutes does not exclude proof of marriage under section 2 of the act of August 7, 1882.

Minor of Jack Redbird 517

Cherokee Nation.

14. The Cherokee Nation, in the year 1859, passed an act prescribing the manner and method of obtaining divorces in said nation. In the year 1866 John Ross, sergeant, Company K, Third Indian Volunteer Home Guards, attempted to divorce his wife according to an old tribal custom, by sending her away from his home, and then took the claimant herein as his wife, the said act still being in force: *Held*, The attempted divorce was futile, and the attempted marriage with claimant void ab initio.

Lucinda Ross (widow) 474

In Kentucky.

15. Claimant and soldier, residing in Kentucky, never having ratified their slave marriage, entered into in that State in 1858, according to the act of February 14, 1866, of the legislature of said State, the same was not valid, and she has no pensionable status as the widow of said soldier. See cases of Nannie Roach (7 P. D., 80); Mary Riddle (10 P. D., 441); Eliza J. Ellis (12 P. D., 159); Estill v. Rogers (1 Bush, Ky., 62), and Maria Meritt (10 P. D., 157).

Martha Maddox 447

16. The appellant and the deceased soldier were colored persons residing in the State of Kentucky, and had been married while in a state of slavery in the year 1862, in accordance with the custom of slaves, but after their emancipation had taken no steps to ratify and legalize their subsisting slave marriage in the manner required by the statutes of that State: *Held*, That the appellant can not be recognized as the widow of soldier, and is not entitled to pension as such under the provisions of the third section of the act of June 27, 1890. (See decisions in cases of Nannie Roach, 7 P. D., 80; Lettie Hawkins, 8 P. D., 22; Maria Merritt, 10 P. D., 157, and Mary Riddle, *ibid.*, 441.)

Eliza J. Ellis (widow) 159

17. The claimant's former husband appearing to have been absent and unheard of for five years preceding her marriage to the soldier, with whom she lived for thirty-six years thereafter, such remarriage was valid under the laws of the State of Kentucky, where contracted, and she is the soldier's lawful widow.

Amy Collins (widow) 202

18. As claimant had a husband living when she married the soldier, such marriage was void, and as a common-law marriage is not sanctioned by the laws of Kentucky, no marriage between claimant and soldier subsequent to the removal of the impediment to their marriage can be presumed.

Maggie Merriman (widow) 439

Louisiana.

19. Under the laws of the State of Louisiana, the claimant is held to have been the lawful wife of the soldier from the year 1880 up to the time of his death, on January 4, 1898. About the year 1880, both parties being able to consent and able to contract, mutually agreed to enter the state of matrimony. From that

time to the date of the soldier's death they lived together and cohabited as man and wife, and, as such, held themselves out to the world. During that whole period they were regarded as man and wife by neighbors and friends among whom they lived.

Françoise Gabriel 382

Massachusetts.

20. Appellant was, prior to her ceremonial marriage to the soldier, married to one Erasmus Holmes, and on her libel was granted a decree of divorce from bed and board against him in the State of Massachusetts. It is not shown that such decree was ever made absolute, or that said marriage had been dissolved. Therefore her marriage to the soldier while said Holmes was living was void and she is not his widow.

Hannah J. Bills (widow) 445

New York.

21. The claimant's marriage to the soldier is shown to have been valid under the laws of the State of New York where celebrated; her former husband being reported and generally believed to have died eleven years before, and not heard of since his reported death, twenty-six years ago at this time.

Ann Green (widow) 306

22. Appellant married the soldier, by ceremony, in the State of New York, February 28, 1866, and they lived together in that State as husband and wife for one year and nine days, when they separated. Some time thereafter soldier left the State of New York for the State of Michigan, accompanied by one Eliza J. White. While in the State of Michigan soldier applied for and obtained a divorce from claimant, May 5, 1870, on the ground of desertion, and on March 4, 1871, married, by a ceremony, said Eliza J. White, in the State of New York, and lived with her as her husband until his death in 1879, two children being born to them during this period: *Held*, That under section 2 of the act of August 7, 1882, which provides that marriages "shall be proved in pension cases to be legal marriages, according to the law of the place where the parties resided at the time of the marriage or at the time when the right to pension accrued," soldier's second marriage was void, the courts of New York, where claimant and soldier were married, and where she resided at the time the right to pension accrued, having decided that a decree of divorce in another State proceeding on a constructive service of process by publication, though valid by the law of the forum, is void in the State of New York, and does not change the status of a defendant in the jurisdiction of the State of New York. (See *Atherton v. Atherton*, 82 Hun., N. Y., 179; *In re House*, 40 N. Y. St., 286; *David v. Davis*, 2 Del., 549; *Williams v. Williams*, 130 N. Y., 193; *People v. Baker*, 76 N. Y., 78; *Vischer v. Vischer*, 12 Barb., N. Y., 640, and *Kerr v. Kerr*, 41 N. Y., 272.)

Eugenia Sherwood (widow) 303

North Carolina.

23. The evidence in the case shows that claimant had an undivorced husband when she married the soldier, and her marriage to the latter, under the law of the State of North Carolina, was void.

Caroline Eborn (widow) 287

Pennsylvania.

24. At the time appellant married the soldier in 1868, in the State of Pennsylvania, he had an undivorced wife living, who died in 1888. She lived with the soldier in the relation of husband and wife from date of marriage to date of his death, July 16, 1890: *Held*, That under the decision of the Pennsylvania courts, their continued cohabitation after the removal of the impediment to

their legal marriage, without evidence of new contract, is not sufficient to raise the presumption of a marriage after the removal of such impediment. See cases of *Sarah C. Hayden* (8 P. D., 364); *Hunt v. Cleveland* (6 Pa. C. C., 592), and *Hautz v. Sealey* (6 Binn., 405).

Rebecca C. Howell (alleged widow) 300

25. Appellant was married to the soldier in the State of Pennsylvania, June 13, 1886, in conformity with the laws of said State, and thereafter lived with him as his wife in the State of Illinois to the date of his death in 1898. At the time said marriage was celebrated soldier had a wife living who was divorced from him September 20, 1886, which fact was not known to appellant until after soldier's death: *Held*, That appellant's marriage to soldier in June, 1886, was void, and that, under these facts, and the laws of Pennsylvania, where this second marriage was celebrated, and of Illinois, where the parties resided at the time the right to pension accrued, a marriage subsequent to the removal of the impediment to a valid marriage between the parties by the divorce of soldier's first wife in September, 1886, can not be presumed, and appellant can not be regarded as the widow of said soldier for pensionable purposes. See cases of *Cartwright et al. v. McGown* (121 Ill., 388), and *Sarah C. Hayden* (8 P. D., 364), and cases therein cited.

Lola T. Harvey (as widow) 326

Tennessee.

26. Claimant, when she was about 15 years of age, was married to one Wyrick, who was about 18 years of age, by a justice of the peace in Tennessee, without having first produced a license so to do. As the age of consent to marriage in said State was 14 years in males and 12 years in females said marriage was valid, and her marriage to soldier while said Wyrick was living and undivorced was void, notwithstanding said Wyrick had married another woman prior to claimant's said marriage.

Common-law marriages are legal in Tennessee.

Mahala Vilos (widow) 468

27. The claimant was the legal wife of Dennis Dean on and after May 26, 1866. She thereafter, on May 30, 1876, attempted to marry the above-named soldier. Dean lived until the year 1893, claimant's second husband living until December 18, 1892. Dean and claimant were never divorced: *Held*, Claimant is not the widow of the soldier in question. (*McReynolds v. The State of Tennessee*, 5 Cold., 20, and *Margaret Gilbert*, 8 P. D., 249.)

28. Claimant will be presumed to have known Dean to have been alive when she contracted her second marriage under the rule made by the Supreme Court in the case of *Oliver v. Piatt* (3 Howard, 333).

Annie Huston, alias Richardson (widow) 514

Presumption of death.

29. It appears by record evidence that claimant was married to the soldier by a parish priest in Auburn, N. Y., January 9, 1868, and lived with him as his wife until his death in 1887. There is evidence in the case tending to show that he had previously been married to one Ann Rivers, who has not been seen or heard of in the community where she lived since 1863, and when last heard of was in the almshouse of Erie County, N. Y., where, it is reported, she died in December, 1863. It is held that the circumstantial evidence in the case gives rise to the inference, with moral and reasonable certainty, that the first wife was dead at the time of claimant's marriage to soldier, and such marriage was legal.

Nora O'Brien (widow) 32

30. The claimant proves her marriage to the sailor in 1888 and continuous cohabitation with him from that time until his death in 1895. The only reason for questioning the validity of said marriage lies in the fact that the sailor stated he had been previously married, but he also affirmed that his former wife was dead. No other evidence of former marriage or death of first wife can be obtained: *Held*, That the mere possibility remaining, after all sources of information have been exhausted, that there was a former wife living in 1888 is not sufficient to defeat the prima facie title of the claimant based on record evidence of a ceremonial marriage followed by continuous cohabitation for a period of seven years.

Annie D. Burgoine (widow) 182

31. The fact that claimant's husband deserted her in 1849, of itself, does not raise the presumption that he was dead in 1861, when she married soldier (Rosie Wilson, 6 P. D., 133; Pythia Ann Sullivan, 7 P. D., 512; Mary A. Warburton, 7 P. D., 49; and Helen L. Pepper, 9 P. D., 500); but the fact of claimant's marriage to the soldier in 1860 or 1861, under the belief that her first husband was dead, her continued cohabitation with him as his wife until his death, thirty-seven or thirty-eight years thereafter, the rearing of a family of children recognized by the soldier and herself as their legitimate children, and the fact the first husband was never heard of since 1849, are circumstances from which it may be inferred that said first husband was dead when claimant married soldier in 1860 or 1861; and that the presumption, from the facts, of innocence and morality outweigh the presumption of the continuance of the life of said first husband, Rider, and claimant's marriage to the soldier was legal.

32. The case of Margaret J. Anderson (4 P. D., 67) is overruled.

Margaret E. Harnden (widow) 278

33. Appellant's marriage to the soldier at a time when she had a husband living and undivorced, she not having exercised ordinary diligence in informing herself as to the whereabouts of such first husband when she contracted a second marriage, such second marriage was not entered into in good faith, in the honest belief that her first husband was dead, and can not be upheld under section 6, chapter 8, article 1, of the New York statutes, vol. 3, and confers on her no right of pension as widow of said second husband.

Mary N. Lester (widow) 340

34. Appellant was married to the soldier in accordance with the law of Ohio in 1886, and lived with him in the State of Michigan as his wife until his death in 1895. One witness has testified that soldier was previously married to a woman in 1865, who left him in 1871, and had not since been heard of. A special examination failed to find any trace of said alleged prior wife: *Held*, That the mere presumption of life is not sufficient to overcome those presumptions which surround the celebration of a marriage, and under the facts as disclosed claimant is recognized as the widow of soldier.

Elizabeth Schneider (widow) 348

MASSACHUSETTS, LAWS OF.

See MARRIAGE AND DIVORCE, 445.

MATERIAL SERVICE.

See ATTORNEYS, 221.

MEANS OF SUPPORT.

See DEPENDENT RELATIVES, 361, 472.

MENTAL DEFICIENCY.

See HELPLESS MINOR, 365.

MILITARY AGE.

See DESERTION, 80; SERVICE, 137.

MILITIA.

See SERVICE, 385, 521

MINORS.

See also DESERTION, 80; GUARDIANSHIP, 1.

Act of March 3, 1865.

1. Section 4 of the act of March 3, 1865, placed title in the minors, to the exclusion of the widow, provided the widow remarried without payment to her of any part of the pension; and said section was not repealed or modified, so far as such issue is concerned, by any act prior to March 30, 1868, the date on which the claim of the widow herein was rejected.

Rhoda E. Tuten (widow) 83

Act of June 27, 1890.

2. The fact that a deceased soldier left a widow surviving him who has not remarried is no bar to pensioning his minor children under 16 years of age under the third section of the act of June 27, 1890, such widow having married soldier subsequent to the passage of said act, and not being entitled to pension in her own right. Case of minor of Lafayette G. Howard (8 P. D., 230) is overruled.

Minors of James Still 25

3. It appearing that this appellant was over the age of 16 years at the date of the soldier's death, he has no title whatever to pension under the provisions of the third section of the act of June 27, 1890.

George W. Robinson (minor) 511

Proof of age.

4. Minors' pension having been withheld on account of claimant's inability to prove the exact dates of birth, a special examination is ordered to obtain, if possible, sufficient data from which to approximate said dates.

A minor's pension should not be withheld because the exact date of birth can not be shown; it is sufficient for all purposes, if the date can be approximated with sufficient certainty so that the Government does not pay beyond the period of pensionable authority.

Caroline Mills (widow) 512

MISSOURI MILITIA.

See SERVICE, 367.

MURDER.

See DEATH CAUSE, 180.

MUSTER.

See SERVICE, 500, 521.

NAVY PENSIONS.

Sections 4715, 4756, and 4757, R. S.

1. Antonio Sousa, the deceased musician, was, in 1879, allowed a money benefit of \$19.50 per month by the Secretary of the Navy, under section 4756, Revised Statutes. Said money benefit was paid by the Commissioner of Pensions under the provisions of said section until May, 1885, when it was withheld, for the reason that said musician was then allowed a pension under the act of July 14, 1862, said withholding continuing up to the death of said musician, in 1892. His widow applied to the Commissioner of Pensions for payment to her of the sum so withheld, and said application was rejected in 1895, upon the ground that she was not entitled in law to file the same, said musician having never filed any such claim in his lifetime. On appeal to this Department said action of rejection was affirmed on August 22, 1901, upon the ground that "the widow has no title to a pension under section 4756, Revised Statutes, her husband having surrendered his title to pension under that section for a pension under the general law." Upon motion for a reconsideration of said departmental decision it is *Held* Although the money benefits granted by sections 4756 and 4757, Revised Statutes (section 6 of the act of March 2, 1867), are, in a general sense, pensions, they are not pensions in the usual and ordinary acceptance of that term, and were intended to be a "further provision for the support" of the beneficiaries thereunder in addition to pensions granted them by other laws. Section 4715, Revised Statutes, and the proviso to the second section of the act of June 27, 1890, prohibiting the allowance of more than one pension at the same time to the same person, constitute, therefore, no bar to the allowance of such money benefits to persons who are in receipt of pensions under other laws (John Spencer, 6 P. D., 167, and 7 P. D., 152; Richard Ewing, 8 P. D., 44; William Finley, 11 P. D., 410).
2. The money benefits granted by sections 4756 and 4757, Revised Statutes (section 6, act of March 2, 1867), are allowed by the Secretary of the Navy, who is, by the express terms of the law, the sole judge of who is entitled to receive them, and the Commissioner of Pensions acts in relation thereto in a purely ministerial capacity, and only as the authorized medium for the transmission or payment of such money benefits to the person certified by the Secretary of the Navy as entitled to receive them, his sole warrant for making such payments being the certificate of the Secretary of the Navy. The Commissioner of Pensions has therefore no authority in law to allow or to decide who are entitled to receive such money benefits, or to withhold the payment of the same from the persons who have been duly certified by the Secretary of the Navy as entitled thereto.
3. The withholding by the Commissioner of Pensions of the payments of the money benefit allowed to the deceased musician, Antonio Sousa, by the Secretary of the Navy, under section 4756, Revised Statutes, from the date of the commencement of the pension allowed him under the general pension law, was wrongful and without authority of law.
4. The question whether the widow of said deceased musician is entitled to apply for and receive said withheld payments as in the nature of accrued pension, or as assets of the estate of her deceased husband, is one which the Commissioner of Pensions has no jurisdiction or authority under the law to determine, but the decision of such question rests exclusively with the Secretary of the Navy, to whom application should be made.
5. The decision of this Department in this case of August 22, 1901, is hereby vacated and set aside.
6. The rejection by the Pension Bureau on April 22, 1895, of the application of the widow for the amount of the withheld money benefit allowed her deceased

husband under section 4756, Revised Statutes, upon the ground that no claim therefor by the husband was pending at the date of his death was error, for the reason that the Commissioner of Pensions had no jurisdiction or authority to decide the question involved or to pass upon said application, and for the further reason that said ground of rejection was not applicable to the facts of the case, but the action rejecting said application is hereby affirmed upon the ground, however, that the Commissioner of Pensions had no jurisdiction or authority in law to hear or determine the same, and that said application should have been made to the Secretary of the Navy.

7. Order No. 380 of the Commissioner of Pensions, which was based upon the holding in the decision rendered in this case by the Department on August 22, 1901, and which is dated September 9, 1901, is hereby abrogated and annulled, and the Commissioner of Pensions will be governed in the payment of money benefits allowed by the Secretary of the Navy under sections 4756 and 4757, Revised Statutes, by the provisions of paragraphs 7 and 8, on page 85, "Practice of the Pension Bureau," and the practice thereunder which prevailed prior to the issuance of said Order No. 380.

Elizabeth Sousa (widow)..... 166

NECESSITOUS CIRCUMSTANCES.

See DIVISION OF PENSION, 336.

NEW YORK LAWS.

See MARRIAGE, 306.

NORTH CAROLINA, LAWS OF.

See MARRIAGE, 287.

NOTICE.

See also DIVISION OF PENSION, 370; FEE, 238; PRACTICE, 44, 157.

1. Appellant was a pensioner on the roll at the rate of \$50 per month (first grade). His pension was increased to \$72 per month under the provisions of the act of June 16, 1880. On April 4, 1896, his rate of pension was reduced to \$30 per month, and on December 1, 1898, he was restored to the rate of \$50 per month from April 4, 1896, date of reduction. It is held that such reduction of the rate of pension was illegal for the reason that the notice sent to pensioner was not such notice as is prescribed by the act of December 21, 1893, as it did not "contain a full and true statement of any charges or allegations" upon which it was proposed to reduce his rate of pension, and that the action restoring him to the rate of \$50 per month from date of reduction (April 4, 1896), was illegal, as no medical examination was had showing a decrease of appellant's disability until July 8, 1898, to which date he was legally entitled to remain on the rolls at the rate of \$72 per month.

Silas Renick..... 21

ON A PASS TO VISIT FRIENDS.

See LINE OF DUTY, 142.

ORDERS.

See also ATTORNEYS, 221.

1. Orders No. 380 of the Commissioner of Pensions, which was based upon the holding in the decision rendered in this case by the Department on August 22, 1901, and which is dated September 9, 1901, is hereby abrogated and annulled, and

the Commissioner of Pensions will be governed in the payment of money benefits allowed by the Secretary of the Navy under sections 4756 and 4757, Revised Statutes, by the provisions of paragraphs 7 and 8, on page 85, "Practice of the Pension Bureau," and the practice thereunder which prevailed prior to the issuance of said order No. 380.

Elizabeth Sousa (widow)..... 166

ORIGIN.

Of disability.

1. Appellant was discharged on account of disability due to disease of eyes upon the recommendation of a board of survey, who reported that while working as a fireman in an electric power house in Washington over two years prior to his enlistment he was (as he says) fire-blinded, so that he could not work for two months, which condition of his eyes became aggravated after his enlistment and detail to the boiler room of the U. S. S. *St. Paul*: *Held*, That disease of eyes did not originate in the service and line of duty.
Charles W. Hickerson..... 298

PARALYSIS.

See INCREASE, 59.

PASS, ON A, TO VISIT FRIENDS.

See LINE OF DUTY, 142.

PATHOLOGY.

See RERATING, 188.

PATHOLOGICAL SEQUENCE.

See also DEATH CAUSE, 342, 354; INCREASE, 59.

Arteriosclerosis and Chronic Diarrhea.

1. The claimant is now pensioned under the act of June 27, 1890. He was formerly pensioned under the general law for piles. His claim for renewal and for additional disability from chronic diarrhea was favorably adjudicated, but it stands rejected on the ground of "no benefit." He alleged that disease of eyes and disease of heart were results of chronic diarrhea. It is shown that he suffers from general arteriosclerosis, and that the affection of the eyes, first noticed in 1897, is due to retinal hemorrhages from this cause. Arteriosclerosis is "a physiologic process of old age," mainly, and there is no recognized pathological relation between this affection and chronic diarrhea as alleged.

Harvey Clark..... 453

Asthma and Cerebral Hemorrhage.

2. The appellant's husband was a pensioner on account of asthma, among other causes, and died of cerebral hemorrhage during an unusually severe paroxysm of said disease: *Held*, That the increased intravascular pressure caused by the asthma produced the fatal hemorrhage.

Philena E. Tibbets (widow)..... 443

Cancer and Malarial Poisoning.

3. The claimant is pensioned, on account of malarial poisoning and resulting disease of liver, at the rate of \$12 per month. The official examination under the claim revealed no material increase of disability from said cause. An induration or tumor at the pyloric end of the stomach was described in the report of said examination, and it appears from the statements of the claimant and the

attorney that this condition has been diagnosticated as cancer. There is no apparent or probable pathological relation between this disease and the pensioned disability.

4. Pensions are granted under certain conditions for wounds or injuries received or diseases contracted in the service of the United States and in the line of duty, and for the pathological results or sequelæ of such wounds, injuries, and diseases. Such pathological results or sequelæ must be recognized and accepted by standard medical and surgical authorities in order to be admitted as the basis for additional allowance of pension. There is no warrant, either in the law or in the established practice, for admitting any disability as such result or sequence unless it is so recognized and accepted.

John C. Holtorf..... 422

Disease of Heart and Erysipelas.

5. The attending physician during his last illness testified that the immediate cause of the soldier's death was "paralysis of heart, induced by erysipelas (facial)." The decedent never filed a claim for pension under the general law, but did file a claim under the act of June 27, 1890, and was pensioned at the maximum rate thereunder for rheumatism, disease of heart, and other causes of disability, which he himself stated were "contracted since the war." His widow, who was also granted a pension under the act of June 27, 1890, based her claim for pension under the general law on the alleged ground that inasmuch as the soldier had an attack of erysipelas during his military service and had a number of similar attacks subsequent to his discharge—during one of which he died—his death was due to his said service. *Held:* 1. That the evidence in the case is insufficient to show that while in the service, or at any time subsequent thereto, the soldier had facial erysipelas, but does show that the year preceding his death he suffered from valvular disease of heart, resulting from rheumatism, which was probably the cause of his demise.
6. That erysipelas is recognized as an acute, self-limited, infectious disease—due to a microorganism—which generally terminates within two weeks; and, though prone to recur, each recurrent attack is due to a fresh invasion of the erysipelas-producing organisms, and is not induced by, or a result of, a prior attack. An attack of such disease in 1894, even though it existed and caused the soldier's death, could not therefore have been a result of his military service.

Annie M. Keiler (widow) 491

Malarial Poisoning and Disease of Heart.

7. The soldier was pensioned for a gunshot wound of the right hand and malarial poisoning. No other affection was alleged or shown to have been due to his military service. He died suddenly, in 1898, from dilatation of the heart, which was secondary to valvular disease of that organ. There was no pathological relation between the malarial poisoning and the disease of heart which proved fatal, nor does it appear that the former affection was a material factor in causing the soldier's death.

Phoebe A. Clough (widow)..... 486

Paralysis and Disease of Spine.

8. The basic principle upon which claims for straight increase under the general law are adjudicated involves, primarily, the question as to whether or not the degree of disability due to pensioned cause or causes, per se, has increased to such an extent as to warrant the allowance of a higher rate of pension, and secondly, the question as to whether or not some sequence has arisen which increases the degree of disability, and, consequently, warrants an increase in

rate. In the case at bar the essential feature of this principle appears to have been ignored in the adjudication of the pensioner's claims for increase filed April 16, 1896, and June 12, 1897, respectively, each of which was rejected principally upon the ground that the paralysis of his left side could not be accepted as a result of the disease of spine for which he is pensioned.

9. In the judgment of the Department, the refusal on the part of the Bureau to accept the paralysis of the claimant's left side as a result of the disease of spine for which he is pensioned was justified by the history of the case furnished by the claimant himself; but it is held that the refusal to allow an increase in rate from third to second grade for disease of spine alone, under each and both of said claims, was error, as it was clearly shown at the medical examinations made pursuant to such claims that he was unable to perform any manual labor by reason of said pensioned cause.
10. All adverse actions in the said claims, both of the Department and the Bureau, are rescinded and set aside.

Thomas C. Johnson..... 59

Practice.

11. The soldier was pensioned for lumbago, and no other affection was alleged or shown to be due to his military service. His death, in 1899, was ascribed by the attending physician to suppression of urine. The evidence shows that the primary cause of the urinary trouble was enlargement of the prostate gland. The pensioned disability was not a material factor in the fatal issue, either directly or indirectly. Lumbago, or rheumatism, is not recognized as a cause of enlargement of the prostate gland.
12. The official statements of examining surgeons are only such statements as are made in their official reports or directly in connection therewith. When an examining surgeon happens also to be (or to have been) the attending physician of a soldier, and in his capacity as such physician furnishes testimony in support of any claim for pension based upon the service of such soldier, his testimony is not official.
13. Additional evidence in pension claims is that which is both executed and filed in addition to evidence which was previously executed and filed; it is also such evidence as may have been executed prior to the adjudication of a claim if the subsequent filing thereof is satisfactorily accounted for. When testimony has been intentionally withheld after its execution and not filed until the claim has been adjudicated, it can not be regarded as additional.

Ann E. Johnson (widow) 425

Typhoid Fever.

14. Since the discovery and isolation—by Eberth, in 1880—of the bacillus of typhoid fever, the views of the medical profession, according to Keen and other recent writers, as to the pathology not only of the fever itself, but also of its complications and sequels, recent and remote, have undergone an entire revolution and much is now understood that was formerly inexplicable. The diffusion of this microorganism is so wide that "scarcely a single tissue or organ of the body escapes invasion by the typhoid bacilli" (Keen). The complications and sequels of typhoid fever are so numerous and so varied that both medical and surgical divisions thereof are now recognized. "Excepting the laryngeal complications and sequels of typhoid fever, the most frequent are those connected with the bones" (Keen); and modern bacteriology now furnishes a scientific method of demonstrating the existence or nonexistence of a pathologic connection between enteric fever and a suspected sequel thereof: *Held*, That inasmuch as the appellant in the case at bar contracted typhoid fever in the military service and line of duty, and, subsequent to his muster out from

such service, certain suppurative conditions arose—involving the bones and other tissues, especially of the right leg, necessitating the amputation of the right foot—which conditions, it is contended, are sequelæ of the said fever, further efforts—through thorough special and medical examinations, respectively—should be made to ascertain whether or not, as a matter of fact, the present condition of the soldier was caused by the enteric fever of service origin.

Charles W. Snowman..... 118

PAYMENT.

See ACCRUED PENSION, 208.

PENNSYLVANIA.

See MARRIAGE AND DIVORCE, 300, 326.

PENSION FUND.

See also GUARDIANSHIP, 1; JURISDICTION, 147.

Guardian.

1. Soldier died August 5, 1884, leaving the appellant, his widow, and a minor child, William P., under 16 years of age. The widow, mother of said minor, remarried December 25, 1884. Said minor was born July 29, 1883, and has resided with his uncle, David H. Hall, continuously since he was 16 months old, who was duly appointed his guardian by the district court in the State of Iowa September 5, 1890. October 4, 1890, said guardian filed a claim for pension as such guardian under the act of June 27, 1890, and appellant also filed a claim for pension under said act as mother of said minor January 31, 1891, and was subsequently, September 7, 1891, appointed guardian of said minor by the probate court of Hubbard County, Minn. On January 31, 1899, her said claim was rejected on the following ground: "That the claim for the minor under the act of June 27, 1890, has this day been allowed and payment ordered to be made to David H. Hall, the guardian, who acquired authority anterior to the filing of this claim, or the appointment of Calista A. Stombaugh as guardian." It is held that Hall, having been recognized as a fit person to act as agent of the Government to receive and disburse the money of his ward, and he having accepted the agency thus imposed and nothing appearing in the record showing that he has broken its terms, the Bureau action rejecting appellant's claim for recognition in the claim was without error.
2. Any contest over the right of possession of the minor or his property must be relegated to the local courts for decision.

Minor of Daniel T. Hall..... 1

POISON.

See LINE OF DUTY, 269.

PRACTICE.

See also JURISDICTION, 263; PATHOLOGICAL SEQUENCE, 425; RATE, 294, 331; REIMBURSEMENT, 289; RERATING, 188.

Notice—Act of March 3, 1899.

1. Appeals in claims under the first, second, and third provisions of the act of March 3, 1899, must be accompanied by due proof of service of notice of the appeal upon the appellee before such appeal will be docketed and considered as an appeal, and the failure to furnish such proof is ground for the dismissal of the appeal. (See *Ellis v. Ellis*, 11 P. D., 288; *Conover v. Conover*, 11 P. D., 524; and *Loughry v. Loughry*, 11 P. D., 523.)

Hantch v. Hantch..... 44

2. In the absence of due proof of service upon the appellee, or his or her attorney, of a copy of an appeal from Bureau action under the first, second, or third provisos of the act of March 3, 1899, there being no waiver of notice, or appearance by or on behalf of the appellee, the appeal will be dismissed. (See *Ellis v. Ellis*, 11 P. D., 288; *Loughry v. Loughry*, *Ibid.*, 523; *Conover v. Conover*, *Ibid.*, 524.)
3. In future such appeals, unaccompanied by due proof of service, in the absence of waiver of notice or appearance on the part of the appellee, will not be filed or docketed, but will be promptly returned to appellant, or his or her attorney of record, for compliance with Rule 14 of Practice, approved November 2, 1901.
4. When the appeal is perfected by due proof of service, it will be filed, docketed, and numbered, and the Bureau of Pensions, the appellant, and appellee promptly notified thereof, in accordance with Rule 15 of Practice, approved November 2, 1901.

Van Houten v. Van Houten 157

5. Appeals in cases under the act of March 3, 1899, when perfected in accordance with Rule 14, Rules of Practice, which requires that they should be accompanied by proof of service of the same on the appellee, will be transmitted to the Bureau of Pensions, whereupon the necessary steps for the suspension of payment of half of the pension due or to become due will be taken, and thereafter, not later than thirty days from the date of filing the appeal, such appeal, and the papers in the case, together with the Commissioner's report thereon, will be returned to the Department.

Yates v. Yates 225

6. The appeal in this case assigns no specific error on the part of the Bureau in the allowance of the claim for division of pension, as required by Rule 2 of Practice, but as an examination of the evidence fails to disclose any error in the Bureau action appealed from, the same is affirmed.
7. Good practice, as well as a proper regard for the rights of the appellees, in cases under the act of March 3, 1899, requires a strict compliance with said Rule 2 on the part of appellants, and in future a failure on the part of the appellants to comply with said rule will be deemed sufficient reason for dismissing their appeals.

Scott v. Scott 411

8. The filing of a valid declaration for division of pension under the act of March 3, 1899, is notice to the Government of the claim for one-half of the pension that may be due or accruing on said date, and further payment of one-half the pension becoming due to the pensioner should be suspended until the adjudication of the claim, and for the period thereafter allowed for appeal, unless an appeal is waived.
9. A declaration under the act of March 3, 1899, must be accompanied by proof in support thereof sufficient to establish a prima facie case under the law.
10. The Bureau of Pensions will promptly notify the claimant and pensioner of the action taken in a claim filed under the act of March 3, 1899, and that thirty days from the receipt of such notice will be allowed in which to file an appeal, during which period payment of one-half of the pension involved will be suspended, unless an appeal is waived.
11. The face brief should show the date on which payment to the wife of one-half of her husband's pension commenced.

Adams v. Adams 370

Short Certificate.

12. If a soldier, sailor, or marine who served in the recent war with Spain incurred, contracted, or received any cause or causes of disability in such service and

line of duty which persisted for a sufficient length of time subsequent to the dates of his discharge and of filing his application for pension, respectively, the duration of which can be satisfactorily determined by competent evidence to amount to a source of actual disability, there is no provision of law or rule of practice by which he can properly be denied a pensionable status during the time he was so disabled subsequent to his filing a formal application for pension: *Provided*, That such pensionable degree of disability was not a mere temporary condition of short duration, indefinite existence, and of unknown or illy defined extent. (See case of Cassilly C. Cook, 12 P. D., 188.)

13. In the event the disabilities which the evidence adduced in this case tends to show the appellant suffered from for a period of over one year subsequent to the date of filing his claim for original invalid pension are, or can be, established as of service origin in the line of duty he is entitled to a pension therefor from the date of filing his said claim to the date of the medical examination which tends to show that a pensionable degree of disability had ceased to exist.

Charles L. Starr 254

PRESUMPTIONS.

See ACCRUED PENSION, 208; EVIDENCE, 111, 155, 264, 278, 292, 306, 312, 340; MARRIAGE, 32, 182, 278, 292, 306, 312, 340, 348.

PRIOR MARRIAGE.

See MARRIAGE AND DIVORCE, 505.

PRIOR SOUNDNESS.

See ORIGIN OF DISABILITY, 298.

PROOF.

See DIVISION OF PENSION, 370; LEGITIMACY, 102; MINORS, 512.

RATE.

See also AID AND ATTENDANCE, 70, 77, 215, 299; DISABILITY, 319; INCREASE, 87, 92; REDUCTION, 244.

Practice.

1. Ratings for minor disabilities can not be added together in order to make a grade rating.
2. Claimant being pensioned at \$22 per month for severe deafness in both ears, the degree of deafness existing at the last medical examination, is not entitled to have said rate increased until a claim for increase shall have been filed and a medical examination had showing an increased degree of disability to exist.

George Geary 294

3. The claimant is receiving \$10 per month under the general law and he was allowed the same amount under the act of June 27, 1890. He has taken no action in relation to the notification as to his right to elect under which law he prefers to receive pension, but the attorney has appealed from the action and allowance under said act. It is held that the claimant was shown by the medical examination to be entitled to the maximum rating, and it is directed that this rating be allowed.
4. Whenever it is shown prior to adjudication that a claimant's disability has been materially increased after his official examination, another medical examination shall be ordered before the claim is rejected or adversely adjudicated, unless such action is based upon legal grounds. It is immaterial whether the claim is for original pension or for increase of pension under either the act of June

27, 1890, or the general law: Provided, of course, the disability under the general law is shown to be due to the pensioned cause or causes, or to a cause or causes which have been legally accepted.

Oscar Caldwell..... 331

RECORD.

See EVIDENCE, 264; MARRIAGE, 434.

REDUCTION.

See also NOTICE.

Rate.

1. The guardian of the soldier who was formerly pensioned at the rate of \$72 per month for insanity has appealed from the reduction of the rate in the case to \$50 per month for such cause of disability. The evidence adduced in the case and the findings of a board of surgeons at a recent test medical examination to which the pensioner was subjected, show conclusively that he neither has nor requires the regular personal aid and attendance of another person: *Held*. (1) That inasmuch as there is no provision of law, as is the case in total blindness and in other specific, permanent causes of disability, which prescribes a fixed rate for insanity per se, no matter what the degree thereof may be, neither the \$50 rate nor the \$72 rate should be allowed for such cause of disability unless the degree of disability due thereto is shown to be such as to wholly disqualify the claimant or pensioner for manual labor, and also necessitate either the frequent and periodical or the regular personal aid and attendance of another person. (George Welch, 3 P. D., 121; James Caton, 6 P. D., 159; Eppenetus McIntosh, 10 P. D., 172.)
2. That the question as to whether or not a pensioner requires the personal aid and attendance of another person is not wholly a medical one. (Edmund O. Beers, 7 P. D., 113; John J. Hill, 7 P. D., 142.)

Lovell Bullock 244

REFUNDMENT.

See FEE, 109, 441.

REIMBURSEMENT.

See also FRAUD AND MISTAKE, 116.

Act of March 2, 1895.

1. The applicant, Alice Haynes, who has been allowed reimbursement for nursing and attendance upon the above-named widow, is not entitled to complete the pending claim of the soldier for the purpose of securing further reimbursement. Title in the accrued invalid pension, if any, rested solely in the widow, and never having been allowed it can not be said to exist, and applicant can not assert any legal right in it.

Charles Staples..... 289

Fraud and mistake.

2. The evidence fails to show that claimant had rheumatism prior to his entry in the service, or that he contracted said disease during said service, and in the absence of fraud on the part of the claimant the action of the Bureau in withholding payments to reimburse the Government was erroneous.

Adelbert L. Orr 394

REMARRIAGE.

See also MARRIAGE AND DIVORCE, 340; MINORS, 83; RESTORATION, 316; WIDOWS' CLAIMS, 139.

Dependent mother.

1. The remarriage of a dependent mother subsequent to the passage of the act of June 27, 1890, and prior to the filing of her claim, under section 4707, as amended by said act, does not affect her pensionable status, if she is shown to be dependent within the meaning of the law.
Rebecca Burton (mother) 509

RENEWAL.

See COMMENCEMENT, 17.

RERATING.

Widow completing.

1. A claim for rerating not having been on file with the papers in her deceased husband's invalid claim at the time of his death, the claim of the appellant, the widow of the decedent, that she is entitled to have the original allowance of his pension rerated from the date of his discharge to the date on which a substantial increase in rate was allowed in such claim, and to be paid the amount of the pension which might accrue under such a rerating, is held to be untenable, as under the rule laid down in the case of Rowland A. Colby (7 P. D., 24) "the widow of a deceased soldier has no right, under the law, to make and prosecute an original claim for a rerating of her husband's invalid claim."
Leander J. Moody (deceased) 212

Practice.

2. The Bureau issued a certificate of pension at the rate of \$15 per month (three-fourths total of rank as captain) for "Disease of heart, result of typhoid fever," contracted during the recent war with Spain, to the appellant in this case, but refused to accept as established his allegation that he was also disabled by disease of nervous system (neurasthenia) as a result of such fever. In the judgment of the Department, however, it is clearly shown from the facts presented, the evidence adduced, and the medical authorities cited that the nervous affection or neurasthenia which wholly disqualified the appellant for the performance of manual labor from October 25, 1898, the date of his discharge, to May 1, 1900, the date of the medical examination showing recovery from neurasthenia, was without doubt a sequel of the typhoid fever of service origin: *Held*, That it would not be contrary to, or inconsistent with, any provision of law or rule of practice to rerate this claim so as to allow the second-grade rate during the time the appellant is shown to have been wholly incapacitated for the performance of manual labor by the sequelæ of typhoid fever, subsequent to the date of filing his application for pension.
Cassilly C. Cook 188

RESIDENCE IN A SOLDIERS' HOME.

See DIVISION OF PENSION, 490.

RES JUDICATA.

Fraud or mistake.

1. The service origin of the soldier's fatal disease having been admitted in the case of the widow after a special examination, the rejection of the minors' claim on the ground that the evidence was insufficient to establish such origin is held to have been error, no fraud, mistake of fact, or error of law being shown.
Minors of Daniel M. Easley 179

RESTORATION.**Act of March 3, 1901.**

1. As the claimant has never received a pension and is not entitled to one under existing law, the act of March 3, 1901, conferred no benefit upon her.

Henrietta Eldridge (widow)..... 316

2. It appearing from the official records of the War Department that during the period that this appellant was the wife of the deceased officer, from January 13, 1880, to May 1, 1883, he rendered no military service in any war, but that during the whole of said period his service in the Regular Army of the United States was that of a post surgeon in time of peace, she has no title to restoration, under the provisions of the act of March 3, 1901, of the pension which she formerly received as the widow of said officer.

Mary E. Rice, formerly Paulding..... 114

RHEUMATISM.

See DEATH CAUSE, 89.

RULE 2 OF RULES OF PRACTICE.

See PRACTICE, 411.

SEA PAY.

See COMMENCEMENT, 428.

SENILITY.

See DISABILITY, 50.

SEPARATION.

See DIVISION OF PENSION, 56, 507.

SERVICE.

See DESERTION, 253, 379; PRACTICE, 157.

Act of June 27, 1890.

1. Appellant enlisted April 6, 1865, and served as landsman in the United States Navy until April 5, 1868, when he was honorably discharged, and under the circumstances in this case he is regarded as having served in the United States Navy for a period of ninety days during the war of the rebellion.

John G. Mulick..... 186

2. The claimant did not serve ninety days during the war of the rebellion. The Government will not credit time spent in desertion in estimating length of service under the act of June 27, 1890.

Henry Denny..... 226

3. Claimant was drafted on October 8, 1864, and rejected on December 12 next thereafter. He was furloughed to await discharge on December 19, 1864, and finally discharged on April 4, 1865. The certificate was afterwards amended so as to take effect from December 19, 1864, by reason of his being a rejected recruit. He was never assigned to any organization or placed on military duty: *Held*, That under these facts he is not pensionable under the act of June 27, 1890, not having served for ninety days or more in the military or naval service of the United States.

Edgar G. Smith..... 466

Section 4701 of the Revised Statutes and act of June 27, 1890.

4. Soldier enlisted April 3, 1865, and was honorably discharged with his company by reason of expiration of service June 25, 1865, but said organization to which he belonged was not disbanded until July 14, 1865: *Held*, That under the provisions of section 4701 of the Revised Statutes the period of his pensionable service was extended to July 14, 1865, and the rejection of his invalid claim under the act of June 27, 1890, on the ground that he did not serve ninety days in the United States service was error.
Adam Kohler..... 407

Joint resolution July 1, 1902.

5. The rejection of the claim for widow's pension under the third section of the act of June 27, 1890, upon the ground that "soldier was not honorably discharged from all rebellion service," being no longer tenable under joint resolution of Congress, approved July 1, 1902, said claim is hereby remanded for reopening and readjudication under the provisions of said joint resolution, and so much of the present appeal as relates to said action of rejection is hereby dismissed.
6. It appearing that the disabilities from which it is alleged the soldier died, and upon which the widow's claim under section 4702, Revised Statutes, is based, were contracted by the soldier while absent from his proper command without leave, and in violation of his first contract of enlistment, and not in line of military duty, this appellant has no title to pension as the widow of the soldier under the provisions of said section. See cases of John Norton (9 P. D., 382); widow of John Sullivan (10 P. D., 55); Patrick H. Burns (11 P. D., 332 and 362); and Lewis Rankin (*ibid.*, 373).
Fannie Cuchfil (widow) 450

Civilians—Substitute.

7. The legal status of a man who becomes a voluntary substitute for a soldier and serves and is discharged in the name of the soldier is that of a civilian, he having never enlisted or been mustered into the military service of the United States. (John S. Williams, 10 P. D., 169.)
8. A civilian who served in the Army or Navy has no pensionable status under section 2 of the act of June 27, 1890, or May 9, 1900. (John Laughlin, 9 P. D., 466.)
9. The words "all persons" in said section 2 are limited by the context to those persons "who served ninety days or more in the military or naval service of the United States," and do not include a person who served in the capacity of a civilian or nonenlisted person. (John H. Meeker, 10 P. D., 182.)
Fred Pain, alias Henry Foreman..... 351

Drafted Man and Substitute.

10. Appellant was enrolled and accepted as a substitute September 27, 1864, rejected by board of medical inspectors November 17, 1864, ordered by Major-General Hooker to be discharged November 28, 1864, and was discharged March 15, 1865, on account of disability existing at time of enrollment: *Held*, That the status of appellant from the time of his acceptance by the board of enrollment, September 27, 1864, to the time of his discharge, March 15, 1865, for disability existing at the time of enlistment, was that of a soldier accepted into the service of the United States, but not assigned to duty as such for the reason that he was physically disqualified to perform military service from causes existing at the time he was accepted.
11. That an appellant was not assigned to any military organization nor to military duty, he did not render to the United States any military service, and hence did not serve for ninety days in the military or naval service of the United

States, as contemplated by the act of June 27, 1890, and is not pensionable under section 2 of said act.

William H. Veach 273

Enlistment.

12. A soldier may be pensionable for disability incurred prior to the date of his muster into the service of the United States, muster in not being an essential to a pensionable status. (Section 4693, R. S.) The Department declines to alter or modify the prevailing practice under the act of June 27, 1890, so far as the dates of enlistment and muster in affect the length of service in a claim under said act.

Jefferson M. Human 500

Military Age.

13. An enlistment of a minor under the age of 18 years in 1861 was voidable, and if he repudiated the contract of enlistment and subsequently reenlisted and served his term of enlistment for ninety days or more during the late war of the rebellion and was honorably discharged therefrom the failure to complete his first term of enlistment is no bar to his receiving a pension under section 2 of the act of June 27, 1890.

Joseph B. Hughes 137

Militia.

14. The State militia organizations in which the service of this appellant during the war of the rebellion was rendered were in the service of the State of Missouri, and were never in the military service of the United States, and military service rendered therein confers no title to pension under the provisions of the second section of the act of June 27, 1890.

John P. Leslie 367

15. Soldier enlisted for three months, on April 16, 1861, in the Sixth Massachusetts Volunteers, and was injured while serving in said organization in the riot in the city of Baltimore on April 19, 1861, being left in said city by his officers. He was never mustered into or out of said service, and the War Department declines to issue a discharge in his case. *Held:* He was a member during the period involved of the Sixth Massachusetts Volunteers, an organization which was a component part of the Army, said organization having been called into the service of the United States by orders of the President, lawfully issued.

16. He was discharged by operation of law from said service when his term of engagement ceased, or when the war of the rebellion ended. He has a pensionable status as a militiaman under the first subdivision of section 4693, R. S. (U. S. v. North, 112 U. S., 510, and Randolph M. Manley, 5 P. D., 295, and cases therein cited.)

Daniel B. Tyler 385

17. *Held:* that the soldier's service in the Pennsylvania Emergency Militia gives a pensionable status; and that the prior soundness of the soldier, the incurrence of the disability alleged in service, its existence at discharge and continuance until death are sufficiently shown to sustain his claim for pension. The said disability is also shown to have been a large contributing factor in the death cause of the soldier, the preponderance of the evidence tending to show that it was the direct and sole cause of death; and the widow is entitled to a pension.

Sarah A. Fowler (widow) 521

SHORT CERTIFICATE.

See PRACTICE, 254.

SLAVES.

See DEPENDENT MOTHERS, 131; MARRIAGE, 287, 447.

SOLDIERS' HOME.

See DIVISION OF PENSION, 490.

SPECIAL ACT.

See COMMENCEMENT, 49.

SPECIFIC.

See DISABILITY, 477.

SUBSTITUTE.

See SERVICE, 351.

SUFFICIENCY.

See DECLARATIONS, 54; EVIDENCE, 155.

SUPPORT.

See DISABILITY, 319.

SURGEON'S CERTIFICATE.

See EVIDENCE, 264.

SUSPENSION OF PAYMENT.

See DIVISION OF PENSION, 370.

TENNESSEE, LAWS OF.

See MARRIAGE, 468, 514.

TUBERCULOSIS.

See DEATH CAUSE, 342.

TYPHOID FEVER.

See PATHOLOGICAL SEQUENCE, 118.

ULCERATIONS.

See DEATH CAUSE, 354.

UNDERGOING PUNISHMENT.

See LINE OF DUTY, 464.

VISION.

See also INCREASE, 87.

1. In the case at bar, a pension at the rate of \$17 per month is held by the Bureau to be adequate to the degree of disability resulting from total blindness of one eye and loss of nine-tenths vision in the other eye from corneal opacity. In the case of William Moore (12 P. D., 87), considered by the Department upon appeal November 30, 1901, the Bureau had allowed the third-grade rate (\$24 per month) for loss of one eye from traumatism, and loss of nine-tenths vision

in the other eye from optic atrophy resulting from said injury. The inequality in the rates allowed by the Bureau in these two cases for practically the same degree of inability to perform manual labor, of each pensioner, by reason of poor vision, demonstrates the advisability of adopting some method by which a more equable adjustment of rates in cases of ocular injuries can be made. In the judgment of the Department the rules laid down, the formulas evolved, and the tables prepared showing the relative values of the different defects of vision, by Würdemann and Magnus in their joint work on "The economic valuation of vision," furnish a medium or working basis for a more uniform arrangement of rates in such class of cases. Accepting their maximum and minimum limits, respectively, of the range of visual acuity necessary as a condition of success in the performance of manual labor, namely, 0.50 (one-half) to 0.05 (one-twentieth) of the full scientific standard, as being both practical and approximately correct, though not controlling, it is quite evident that a visual acuity that is limited to one-tenth of normal, and exists in but one eye (the conditions shown in this case) is a very low grade of vision: *Held*, That the degree of disability resulting from the amount of damage to the visual acuity of the appellant in this case is fully equivalent to the loss of a hand or foot for purposes of manual labor, and warrants the allowance of the third-grade rate (the rate allowed in the case cited above, for an equivalent though not identical cause of disability).

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VOIDABLE ENLISTMENT.

See DESERTION, 80.

VOID ENLISTMENT.

See SERVICE, 137.

VOID MARRIAGE.

See MARRIAGE, 106.

WIDOWS.

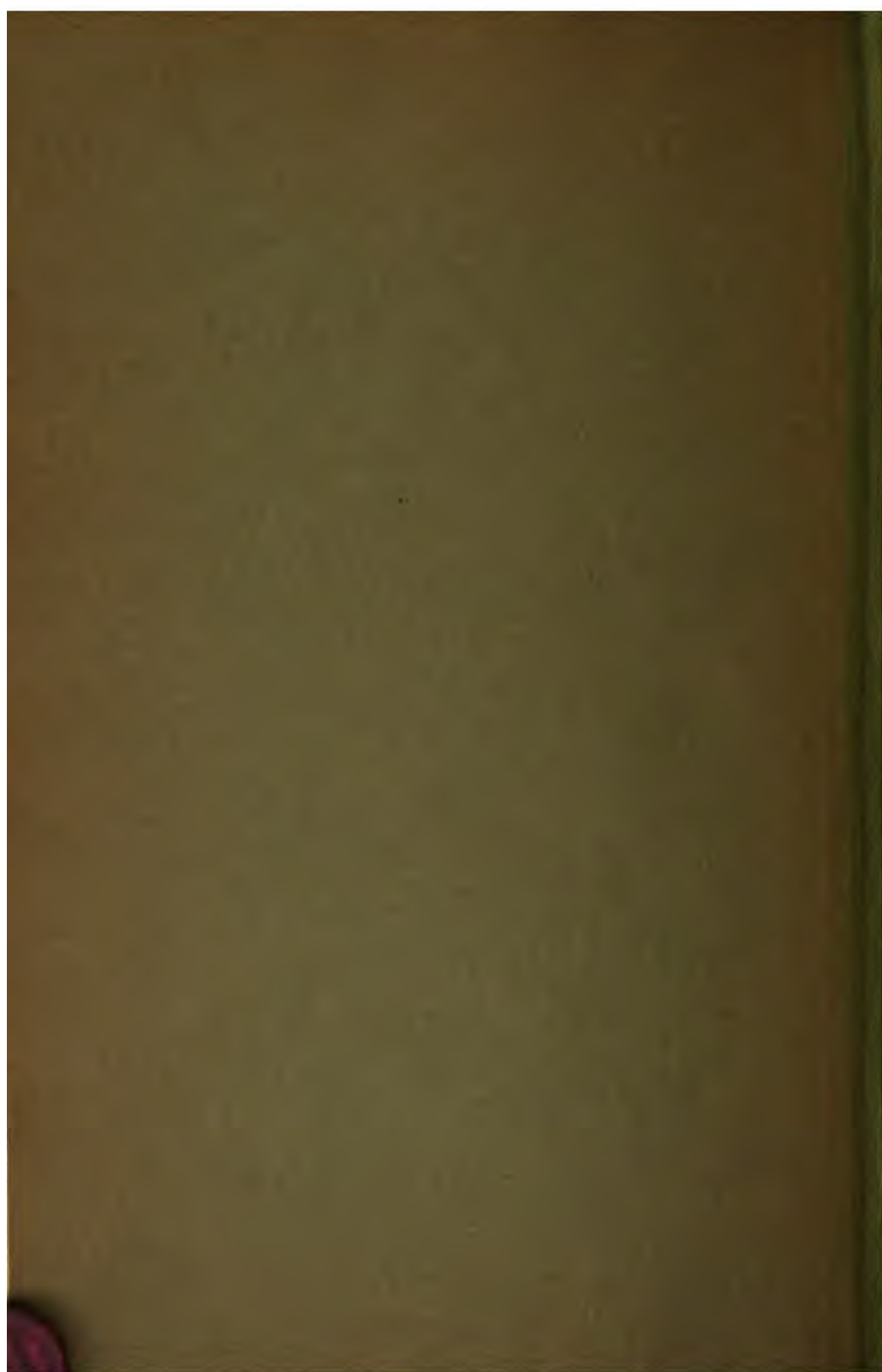
See DEPENDENCE, 40, 266; IDENTITY, 228; LIMITATION, 479; MINOR'S PENSION, 25, 83; RERATING, 212; RESTORATION, 114, 316.

WITNESSES.

See PATHOLOGICAL SEQUENCE, 425.

WOOD ALCOHOL.

See LINE OF DUTY, 269.



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